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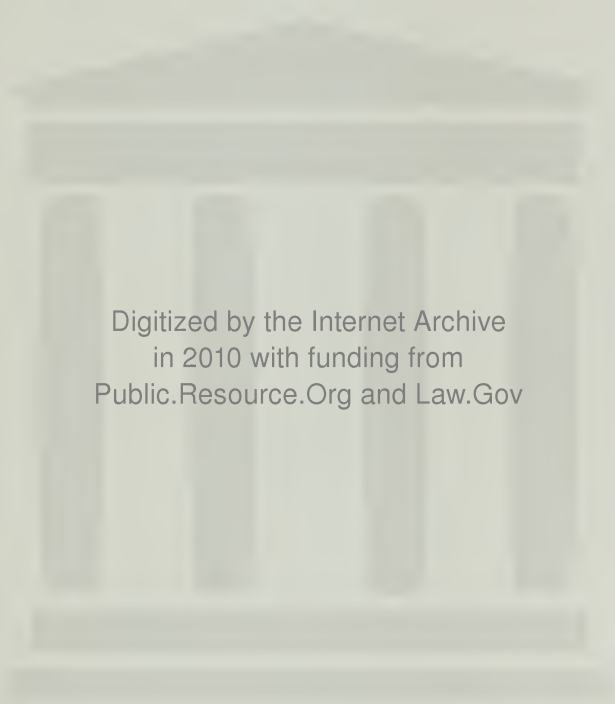
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2924
No. 14630

United States
Court of Appeals
for the Ninth Circuit

LOUIS P. LUTFY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

MAY 18 1955

PAUL P. O'BRIEN, CLERK

No. 14630

United States
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for the Ninth Circuit

LOUIS P. LUTFY,

Appellant,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Appeal:

Clerk's Certificate to Record on..... 448

Notice of 45

Order Extending Time for Docketing..... 48

Order Granting Stay of Execution and Ad-
mitting Bail on..... 44

Statement of Points Upon on (U.S.D.C.).. 48

Statement of Points Upon on (U.S.C.A.).. 453

Attorneys of Record..... 1

Bill of Particulars..... 11

Bill of Particulars, Amended..... 16

Clerk's Certificate to Record on Appeal..... 448

Docket Entries of March 12, and October 18,
1954 47

Indictment 3

Judgment and Commitment..... 42

Minute Entries:

May 4, 1953—Arraignment and Plea..... 15

October 9, 1953—Trial Setting..... 15

INDEX

PAGE

Minute Entries—(Continued):

December 23, 1953—Order for Filing of Proposed Amended Bill of Particulars as Bill of Particulars Herein and Trial Re- setting	17
February 8, 1954—Order Striking Defend- ant's Motion for Bill of Particulars Subject to Reinstatement by Either Party	22
September 7, 1954—Proceedings of Trial..	23
September 8, 1954—Proceedings of Trial..	25
September 9, 1954—Proceedings of Trial..	29
September 10, 1954—Proceedings of Trial.	30
September 14, 1954—Proceedings of Trial.	32
September 15, 1954—Proceedings of Trial.	34
September 16, 1954—Proceedings of Trial.	35
September 20, 1954—Order Granting Addi- tional Time for Defendant to File Sup- plemental Grounds in Support of Motion for New Trial, etc.....	41
October 18, 1954—Order Denying Defend- ant's Motion for New Trial.....	41
November 18, 1954—Order Extending Time to File Record on Appeal to January 4, 1955	47
January 10, 1955—Order Extending Time for Docketing Record on Appeal to Feb- ruary 1, 1955.....	52

INDEX

PAGE

Motion for Bill of Particulars.....	7
Motion for Further Particulars, Defendant's..	17
Motion for New Trial.....	37
Notice of Appeal.....	45
Order Extending Time for Docketing Appeal and Transmitting Record.....	48
Order Granting Stay of Execution and Admit- ting to Bail on Appeal.....	44
Reply to Defendant's Motion for Further Par- ticulars, Government's	20
Statement of Points Upon Which Defendant- Appellant Relies on Appeal (U.S.D.C.).....	48
Statement of Points Upon Which Appellant Relies on Appeal (U.S.C.A.).....	453
Transcript of Proceedings.....	52
Instructions to the Jury.....	445
Witnesses:	
Bamrick, Edward J.	
—direct	129, 133
—cross	133
—redirect	137
Beale, Clarence J.	
—direct	59, 86
Donovan, Fred	
—direct	79

	INDEX	PAGE
Witnesses—(Continued):		
Fairfield, John L.		
—direct		68
—voir dire		70
Foster, Robert M.		
—direct		84
Herre, Robert F.		
—direct		71
—cross		77
Larson, Mrs. Margaret		
—direct		81
Linsenmeyer, Howard		
—direct		56
—cross		57
Lutfy, Bertha A.		
—direct	279,	304
—cross		308
—redirect		320
—recross		324
McGuckin, Hugh		
—direct		53
—cross		55
Moser, R. Dale		
—direct		325
—cross	377,	425
—redirect		432
—recross		438

INDEX

PAGE

Witnesses—(Continued):

Way, Raye

—direct	96
—cross	108
—redirect	126
—recross	128

Wightman, Charles M.

—direct	78
---------------	----

Whitsett, Howard H.

—direct	142, 159, 193, 212
—voir dire	158
—cross	217, 226
—redirect	261, 272
—recross	271

Verdict	37
---------------	----

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Tucson, Arizona,

Attorneys for Appellee.

In the United States District Court
for the District of Arizona

No. C-10712 Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS P. LUTFY,

Defendant.

INDICTMENT

Violation: 26 U.S.C. 145(b) (Attempt to defeat and
evade income tax.)

The Grand Jury charges:

Count I.

That on or about the 15th day of March, 1947, in the District of Arizona, Louis P. Lutfy, a resident of Phoenix, Arizona, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year, computed on the community property basis, was the sum of \$2,309.91, and that the amount of tax due and owing thereon was the sum of \$248.88, whereas, as he then

and there well knew, his net income for said calendar year, computed on the community property basis, was the sum of \$10,168.11, upon which said net income he owed to the United States of America an income tax of \$2,239.44.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Count II.

That on or about the 15th day of March, 1947, in the District of Arizona, Louis P. Lutfy, who, during the calendar year 1946, was married to Bertha A. Lutfy, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Bertha A. Lutfy to the United States of America, for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent income tax return for and on behalf of the said Bertha A. Lutfy, in which it was stated that her net income for said calendar year, computed on the community property basis, was the sum of \$2,309.91 and that the amount of tax due and owing thereon was the sum of \$153.88, whereas, as he then and there well knew, her net income for the said calendar year, computed on the community property basis, was the sum of \$10,168.11, upon which said net income there was owing to the United States of America, an income tax of \$2,077.80.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Count III.

That on or about the 1st day of March, 1948, in the District of Arizona, Louis P. Lutfy, a resident of Phoenix, Arizona, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community property basis, was the sum of \$4,177.19, and that the amount of tax due and owing thereon was the sum of \$626.03, whereas, as he then and there well knew, his net income for said calendar year, computed on the community property basis, was the sum of \$13,293.16, upon which said net income he owed to the United States of America an income tax of \$3,349.76.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Count IV.

That on or about the 1st day of March, 1948, in the District of Arizona, Louis P. Lutfy, a resident of Phoenix, Arizona, who, during the calendar year 1947 was married to Bertha A. Lutfy, did wilfully

and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Bertha A. Lutfy to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent income tax return for and on behalf of the said Bertha A. Lutfy, in which it was stated that her net income for the said calendar year, computed on the community property basis, was the sum of \$4,177.18, and that the amount of tax due and owing thereon was the sum of \$521.53, whereas, as he then and there well knew, her net income for the said calendar year, computed on the community property basis, was the sum of \$13,293.16, upon which said net income there was owing to the United States of America an income tax of \$2,931.53.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Count V.

That on or about the 8th day of February, 1949, in the District of Arizona, Louis P. Lutfy, who, during the calendar year 1948, was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent joint in-

come tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$18,453.62, and that the amount of tax due and owing thereon was the sum of \$3,265.36, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$32,790.65, upon which said net income there was owing to the United States of America an income tax of \$8,198.22.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

A True Bill.

/s/ MARVIN L. CHAPMAN,
Foreman.

/s/ [Illegible.]
United States Attorney.

[Endorsed]: Filed February 26, 1953.

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Comes Now the defendant and moves the Court for an Order directing the United States Attorney to serve and file a Bill of Particulars of the above-described Indictment, particularly setting forth the following:

1. The items of income which, according to the government's information, defendant omitted from

his income tax return described in Count I of the Indictment.

2. The source of each such item of income so omitted, according to the government's information, described in Count I of the Indictment.

3. The deductions not allowed by law, if any, which, according to the government's information, the defendant took in his income tax return described in Count I of the Indictment.

4. The items of income, which, according to the government's information, defendant caused Bertha A. Lutfy to omit from her income tax return described in Count II of the Indictment.

5. The source of each such item of income so omitted, according to the government's information, described in Count II of the Indictment.

6. The deductions not allowed by law, if any, which according to the government's information, the defendant caused Bertha A. Lutfy to take in her income tax return described in Count II of the Indictment.

7. The items of income which, according to the government's information, defendant omitted from his income tax return described in Count III of the Indictment.

8. The source of each such item of income so omitted, according to the government's information, described in Count III of the Indictment.

9. The deductions not allowed by law, if any, which according to the government's information,

the defendant took in his income tax return described in Count III of the Indictment.

10. The items of income, which, according to the government's information, defendant caused Bertha A. Lutfy to omit from her income tax return described in Count IV of the Indictment.

11. The source of each such item of income so omitted, according to the government's information, described in Count IV of the Indictment.

12. The deductions not allowed by law, if any, which, according to the government's information, the defendant caused Bertha A. Lutfy to take in her income tax return described in Count IV of the Indictment.

13. The items of income, which, according to the government's information, defendant omitted from his income tax return described in Count V of the Indictment.

14. The source of each item of income so omitted, according to the government's information, described in Count V of the Indictment.

15. The deductions not allowed by law, if any, which, according to the government's information, the defendant took in his income tax return described in Count V of the Indictment.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendant.

In support of the foregoing Motion for a Bill of Particulars, defendant respectfully represents to the Court that he is a physician, engaged in the general practice of medicine and surgery, by reason whereof a large number of items enter into his aggregate income for any year in question. In addition thereto, many items of expense and other deductions which defendant believes himself legitimately entitled to, are also involved in determining the appropriate deductions to be taken by defendant in ascertaining his net or taxable income for any of the years in question. In addition thereto, defendant during the years in question from time to time made certain investments in real estate, certain sales and other business transactions, all of which require that the defendant be apprised in advance of the trial as to the particular transactions or items going into the tax return of any of the years in question are claimed by the government to be illegal or improper, as otherwise defendant will be entirely unable to prepare for trial and to meet the accusations of the government other than through tedious delays in the course of the trial.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendant.

[Endorsed]: Filed April 20, 1953.

[Title of District Court and Cause.]

BILL OF PARTICULARS

Comes Now the United States of America, by Edward W. Scruggs, United States Attorney for the District of Arizona, and James E. Hunter, Assistant U. S. Attorney, and presents this Bill of Particulars furnished by the United States to the defendant, Louis P. Lutfy, pursuant to Motion for Bill of Particulars filed by defendant herein.

Count I.

In answer to paragraph 1 of defendant's Motion for Bill of Particulars:

Community one-half of additional income described in plaintiff's answer to paragraph 2 of defendant's Motion for Bill of Particulars.

In answer to paragraph 2 of defendant's Motion for Bill of Particulars:

Interest	\$ 141.11
Rental receipts	2,481.12
Capital gains	3,564.30
Business income	9,529.88

Total omitted income.....	<u>\$15,716.41</u>
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Community one-half of

Louis P. Lutfy.....	\$ 7,858.20
---------------------	-------------

In answer to paragraph 3 of defendant's Motion for Bill of Particulars: It is not alleged that the defendant took deductions not allowed by law.

Count II.

In answer to paragraph 4 of defendant's Motion for Bill of Particulars:

Community one-half of additional income described in plaintiff's answer to paragraph 5 of defendant's Motion for Bill of Particulars.

In answer to paragraph 5 of defendant's Motion for Bill of Particulars:

Interest	\$ 141.11
Rental receipts	2,481.12
Capital gains	3,564.30
Business income	9,529.88
Total omitted income.....	<u>\$15,716.41</u>

Community one-half of Bertha A.

Lutfy\$ 7,858.21

In answer to paragraph 6 of defendant's Motion for Bill of Particulars: It is not alleged that the defendant caused Bertha A. Lutfy to take deductions not allowed by law.

Count III.

In answer to paragraph 7 of defendant's Motion for Bill of Particulars:

Community one-half of additional income described in plaintiff's answer to paragraph 8 of defendant's Motion for Bill of Particulars.

In answer to paragraph 8 of defendant's Motion for Bill of Particulars:

Dividends and interest.....	\$ 149.84
Rental Receipts	2,022.17

Capital gains	12.50
Business income	16,386.66
Total omitted income.....	<u>18,571.17</u>
Less loss on sale of other assets.....	339.22
	<u>\$18,231.95</u>
Community one-half of Louis P. Lutfy	\$ 9,115.98

In answer to paragraph 9 of defendant's Motion for Bill of Particulars: It is not alleged that the defendant took deductions not allowed by law.

Count IV.

In answer to paragraph 10 of defendant's Motion for Bill of Particulars:

Community one-half of additional income described in plaintiff's answer to paragraph 11 of defendant's Motion for Bill of Particulars.

In answer to paragraph 11 of defendant's Motion for Bill of Particulars:

Dividends and interest.....	\$ 149.84
Rental Receipts.....	2,022.17
Capital gains	12.50
Business income	16,386.66
Total omitted income.....	<u>18,571.17</u>
Less loss on sale of other assets..	339.22
	<u>\$18,231.95</u>
Community one-half of Bertha A. Lutfy	\$ 9,115.97

In answer to paragraph 12 of defendant's Motion for Bill of Particulars: It is not alleged that the defendant caused Bertha A. Lutfy to take deductions not allowed by law.

Count V.

In answer to paragraph 13 of defendant's Motion for Bill of Particulars:

Community income described in plaintiff's answer to paragraph 14 of defendant's Motion for Bill of Particulars.

In answer to paragraph 14 of defendant's Motion for Bill of Particulars:

Rental income	\$ 2,282.34
Capital gains	2,730.08
Business income	9,324.61
Total omitted income.....	<u>\$14,337.03</u>

In answer to paragraph 15 of defendant's Motion for Bill of Particulars: It is not alleged that the defendant took deductions not allowed by law.

EDWARD W. SCRUGGS,
United States Attorney;

/s/ JAMES E. HUNTER,
Assistant U. S. Attorney.

(Copy mailed.)

[Endorsed]: Filed April 24, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, MAY 4, 1953

(Phoenix Division)

Defendant's Motion for Bill of Particulars comes on regularly for hearing this day. James E. Hunter, Esq., Assistant United States Attorney, appears for the Government. The defendant is present in person with his counsel Mark Wilmer, Esq. Counsel for the defendant states that Bill of Particulars has been supplied. The defendant is now duly arraigned. The defendant waives reading of the indictment and is now called upon to plead. The defendant's plea is not guilty, which plea is duly entered.

It Is Ordered that this case is set for trial October 27, 1953, at 10:00 o'clock a.m.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY, OCT. 9, 1953

(Phoenix Division)

On motion of Mark Wilmer, Esq., counsel for the defendant,

It Is Ordered that said Mark Wilmer is allowed to withdraw as counsel for the defendant herein.

On motion of Darrell Parker, Esq., who appears as counsel for the defendant,

It Is Ordered that the order setting this case for trial at Phoenix on October 27, 1953, is vacated and that this case be transferred to Tucson for further proceedings.

[Title of District Court and Cause.]

AMENDED BILL OF PARTICULARS

The United States of America, by Jack D. H. Hays, United States Attorney for the District of Arizona, and Robert S. Murlless, Assistant United States Attorney for said district, files this Amended Bill of Particulars in response to defendant's Motion for Bill of Particulars.

Counts I-V

As to paragraphs 1 to 15, inclusive, of Counts I-V, inclusive, of Indictment No. C-10,712 Phx., the income which the defendant did not report on his income tax returns for the calendar years 1946 to 1948, inclusive, and the income which was omitted from the income tax returns for those same years of his wife, Bertha A. Lutfy, as alleged in Indictment No. C-10,712 Phx., is based upon annual increases in the defendant's net worth for the years 1946 to 1948, inclusive, plus expenditures in those years. The source or possible source from which such income was derived included income from interest, rental receipts, capital gains, and business income.

JACK D. H. HAYS,

United States Attorney;

/s/ ROBERT S. MURLLESS,

Assistant U. S. Attorney.

[Endorsed]: Filed December 15, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY OF WEDNESDAY,
DECEMBER 23, 1953

Honorable James A. Walsh, United States District
Judge, Presiding.

Jack D. H. Hays, Esquire, United States Attorney, is present for the government. Darrell Parker, Esquire, appears on behalf of the defendant, and

It Is Ordered that plaintiff's application for leave to amend its Bill of Particulars is granted, and It Is Further Ordered that the defendant is granted thirty (30) days following the filing of the amended bill of particulars within which to move for further particulars.

It Is Ordered that the trial setting of this case for January 7, 1954, is vacated and this case is reset for trial at Tucson, on April 13, 1954, at ten o'clock, a.m.

It Is Further Ordered that the proposed amended bill of particulars be filed as the Bill of Particulars herein.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR
FURTHER PARTICULARS

Having considered the content of the Government's original Bill of Particulars filed herein on or

about April 24, 1953, together with the Amended Bill of Particulars filed herein on or about December 15, 1953, defendant and his counsel are more confused and less certain as to the charges which must be met upon the trial of this case than was the case prior to the filing of the Amended Bill of Particulars.

Now, therefore, said defendant, by his attorneys undersigned, respectfully moves the above-entitled Court for an order requiring the United States Attorney to make, furnish and provide the defendant with additional particulars responsive to the following questions:

1. Does the Government continue in its position asserted in the original Bill of Particulars as follows: "It is not alleged that the defendant took deductions not allowed by law"?

2. With respect to Counts I and II of the Indictment, does the Government continue to assert or allege that the defendant failed for the calendar year 1946 to report the following income: Interest, \$141.11; Rental Receipts, \$2,481.12; Capital gains, \$3,564.30; Business income, \$9,529.88; Total omitted income, \$15,716.41; Community one-half of Louis P. Lutfy, \$7,858.20; Community one-half of Bertha A. Lutfy, \$7,858.21?

3. With respect to Counts III and IV of the Indictment does the Government continue to assert or allege that the defendant failed, for the calendar year 1947, to report the following income: Divi-

dends and interest, \$149.84; Rental Receipts, \$2,022.17; Capital gains, \$12.50; Business income, \$16,386.66; Total omitted income, \$18,571.17, less loss on sale of other assets, \$339.22, \$18,231.95; Community one-half of Louis P. Lutfy, \$9,115.98; Community one-half of Bertha A. Lutfy, \$9,115.98?

4. With respect to Count V of the Indictment, does the Government continue to assert or allege that the defendant failed, for the calendar year 1948, to report the following income: Rental income, \$2,282.34; Capital gains, \$2,730.08; Business income, \$9,324.61; Total omitted income, \$14,337.03?

It appears from the Amended Bill of Particulars that the Government expects to attempt to convict defendant as charged in the Indictment “* * * upon annual increases in the defendant’s net worth for the years 1946 to 1948, inclusive, plus expenditures in those years.” That defendant respectfully moves the above-entitled Court that the said Amended Bill of Particulars be made more specific by requiring the attorneys for the Government to set forth the following information:

- (a) Net worth of defendant January 1, 1946;
- (b) Net worth of defendant December 31, 1946;
- (c) Net worth of defendant December 31, 1947;
- (d) Net worth of defendant December 31, 1948;
- (e) The amounts which the Government claims defendant expended in each of the three calendar years above-mentioned;

(f) A list, with valuations, of all items constituting defendant's net worth as of the following dates: (1) December 31, 1945, or January 1, 1946; (2) December 31, 1948.

Dated at Phoenix, Arizona, this 22nd day of January, 1954

PARKER & MUECKE,

By /s/ DARRELL R. PARKER,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 25, 1954.

[Title of District Court and Cause.]

GOVERNMENT'S REPLY TO DEFENDANT'S
MOTION FOR FURTHER PARTICULARS

The United States of America, by Jack D. H. Hays, United States Attorney for the District of Arizona, in reply to Defendant's Motion for Further Particulars, states:

1. All personal deductions listed on Page 3 of the individual income tax returns filed or caused to be filed by defendant with the Collector of Internal Revenue for the district of Arizona, for the calendar years 1946 and 1947, have been allowed as claimed with the exception of the Medical Expense claimed for 1946, and the theft of a Lincoln automobile claimed for 1947. The medical expense listed for

1946 has been disallowed as the amount thereof was not in excess of five per cent of adjusted gross income as corrected. The amount claimed as a deduction resulting from the theft of the Lincoln automobile in 1947, has been disallowed in part.

All nondeductible personal expenses taken as business deductions have been disallowed.

2-3-4. The Government asserts that the income which should have been reported as stated in Counts I to V, inclusive, was determined upon the basis of annual increases in the net worth of the defendant and his wife for the years 1946 to 1948, inclusive, plus nondeductible expenditures made by them in those years, and that the source or possible source from which such income was derived included rental receipts, capital gains, interest, and/or professional business.

4(a) to 4(d). The Government alleges, as follows:

- (a). Net worth, December 31, 1945. \$ 61,248.40
- (b). Net worth, December 31, 1946. 71,886.55
- (c). Net worth, December 31, 1947. 87,739.18
- (d). Net worth, December 31, 1948. 115,732.01

4(e). The Government asserts that the defendant and his wife made the following expenditures:

\$20,336.23 in 1946.

27,591.28 in 1947.

36,520.72 in 1948.

4(f). The net worth of the defendant and his wife as of the following dates was composed of the

following-named items, the valuations of which are peculiarly within the knowledge of and best known to the defendant:

Assets	12/31/45	12/31/48
1. Cash on Hand and in Banks	x	x
2. Accounts Receivable		x
3. Notes and Mortgages Re- ceivable	x	x
4. Stocks and Bonds		x
5. Automobiles	x	x
6. Medical Equipment	x	x
7. Real Estate.....	x	x
Liabilities		
8. Mortgages Payable		x
9. Depreciation Reserve....	x	x
10. Checks Outstanding Close of Year	x	x

JACK D. H. HAYS,
United States Attorney.

[Endorsed]: Filed February 8, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY,
FEBRUARY 8, 1954

Honorable James A. Walsh, United States District
Judge, Presiding.

Defendant's Motion for Bill of Particulars comes
on regularly for hearing this day. Robert O. Royle

ston, Esquire, Assistant United States Attorney, appears on behalf of the Government. No appearance is made by or on behalf of the defendant. On stipulation of counsel,

It Is Ordered that defendant's Motion for Bill of Particulars is stricken from the calendar subject to reinstatement by the defendant upon three days' notice to the United States Attorney.

MINUTE ENTRY OF TUESDAY,
SEPTEMBER 7, 1954

(Tucson Division)

Honorable James A. Walsh, United States District Judge, Presiding.

This case comes on regularly for trial this day. Robert O. Royston, Esq., Assistant United States Attorney, and Mary Anne Reimann, Esq., Assistant United States Attorney, appear for the Government. The defendant, Louis P. Lutfy, is present in person with his counsel, Darrell R. Parker, Esq.

Both sides announce ready for trial.

And thereupon, at 11:50 o'clock a.m., It Is Ordered that the further trial of this case be continued to two o'clock p.m., this date, to which time the jury, the defendant and counsel are excused.

Subsequently, at two o'clock p.m., the jury, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

The Jury of twelve persons is now duly empaneled and sworn to try this case.

Robert O. Royston, Esq., Assistant United States Attorney, now reads aloud the Indictment to the Jury and thereafter said counsel for the Government states to the Jury the defendant's plea of Not Guilty to said Indictment.

The said Assistant United States Attorney now states the Government's case, and thereafter, Darrell Parker, Esq., states the defendant's case to the Jury.

Government's Case

Hugh McGucken is now sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

1. Income Tax Return.
2. Income Tax Return.
3. Income Tax Return.
4. Income Tax Return.
5. Income Tax Return.
6. Certificate.
7. Income Tax Return.

The following Government's witnesses are now sworn and examined:

Anthony Duran.
Walter S. Alpert.
Joseph L. Schmitt.

Government's exhibit 8, file, is now admitted in evidence.

The following Government's witnesses are now sworn and examined:

Howard Linsenmeyer.

Walter S. Wilson.

It Is Ordered that Government's exhibit 9, envelope, marked for identification, be stricken from the record.

The following Government's witnesses are now sworn and examined:

Clarence J. Beale.

John M. Fairfield.

And thereupon, at 4:30 o'clock p.m., It Is Ordered that the further trial of this case be continued to Wednesday, September 8, 1954, at ten o'clock a.m., to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

MINUTE ENTRY OF WEDNESDAY,
SEPTEMBER 8, 1954
(Tucson Division)

Honorable James A. Walsh, United States District Judge, Presiding.

The Jury, and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Government's Case Continued:

Government's exhibit 12, Certificate and photographic copies, is now admitted in evidence.

Robert F. Herre is now sworn and examined on behalf of the Government.

Government's exhibit 13, Certificate, is now admitted in evidence.

Charles M. Wightman is now sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

14. Letter.

15. Deposit slip and photostat.

The following Government's witnesses are now sworn and examined:

Fred Donovan.

Pryor Day.

Government's exhibit 17, Ledger sheets, is now admitted in evidence only as to the years 1946, 1947 and 1948.

The following Government's witnesses are now sworn and examined:

Mrs. Margaret Larsen.

Hannah C. Stein.

Government's exhibit 18, Affidavit, is now admitted in evidence.

The following Government's witnesses are now sworn and examined:

Robert M. Foster.

Florence Ruppelius.

Government's exhibit 19, Cancelled Check, is now admitted in evidence.

Ernest R. Morris, Deputy Recorder of Maricopa County, is now sworn and examined on behalf of the Government.

Government's exhibit 20, Photostatic copy, is now admitted in evidence.

And thereupon, at 11:55 o'clock a.m., It Is Ordered that the further trial of this case be continued to two o'clock p.m. this date, to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at two o'clock p.m., the Jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Government's Case Continued:

Clarence J. Beale, heretofore sworn, is now recalled and further examined on behalf of the government.

Government's exhibit 9, Envelope, is now admitted in evidence.

Philip Lantin is now sworn and examined on behalf of the government.

The following Government's exhibits are now admitted in evidence:

21. Cancelled check.

22. Cancelled check.

Harry C. Jones is now sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

- 23. Photostat.
- 24. Affidavit and certificate.
- 25. Affidavit and certificate.

The following Government's witnesses are now sworn and examined:

Leslie Madison.
Rae Way.

The following Government's exhibits are now admitted in evidence pursuant to stipulation of counsel:

- 28. Copy of Statement.
- 29. Stipulation of Facts.
- 30. Stipulation of Facts.
- 31. Stipulation of Facts.

And thereupon, at 4:30 o'clock p.m., It Is Ordered that the further trial of this case be continued to Thursday, September 9, 1954, at ten o'clock a.m., to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
SEPTEMBER 9, 1954

Honorable James A. Walsh, United States District
Judge, Presiding.

The jury, and all members thereof, the defendant
and all counsel are present pursuant to recess, and
further proceedings of trial are had as follows:

Government's Case Continued:

The following Government's witnesses are now
sworn and examined:

Clarence A. Westring.

Edward J. Bamrick.

Government's Exhibit 32, photostatic copy, is
now admitted in evidence.

And thereupon, at 11:45 o'clock a.m., It Is Or-
dered that the further trial of this case be continued
to 1:45 o'clock p.m., this date, to which time the
jury, being first duly admonished by the Court, the
defendant and counsel are excused.

Subsequently, at 1:45 o'clock p.m., the jury and
all members thereof, the defendant and counsel for
respective parties being present pursuant to recess,
further proceedings of trial are had as follows:

Government's Case Continued:

The following Government's exhibits are now
admitted in evidence:

26. Letterhead.

33. Net worth statement.

And thereupon, at 3:45 o'clock p.m., It Is Ordered that the jury, being first duly admonished by the Court, is excused until Friday, September 10, 1954, at ten o'clock a.m.

The jury having withdrawn from the courtroom, the defendant and all counsel being present, counsel for the defendant now moves that the trial of this case be continued for ten days. Said motion is duly argued by respective counsel, and

It Is Ordered that hearing on said motion for continuance is continued until Friday, September 10, 1954, at nine o'clock a.m., to which time the defendant and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,
SEPTEMBER 10, 1954

Honorable James A. Walsh, United States District Judge, Presiding.

All counsel are present pursuant to recess, and

It Is Ordered that the Court's ruling on defendant's motion to strike the testimony as to depreciation and on defendant's motion for continuance of trial is reserved.

The jury, and all members thereof, and the defendant are present pursuant to recess, and further proceedings of trial are had as follows:

Government's Case Continued:

Government's Exhibit 34, computation, is now admitted in evidence.

Howard H. Whitsett, heretofore sworn, is now recalled and further examined on behalf of the Government.

Julia Sprague is now sworn and examined on behalf of the Government.

Government's Exhibit 27, photostats, is now admitted in evidence.

And thereupon, at twelve o'clock noon, It Is Ordered that the further trial of this case be continued to two o'clock p.m., this date, to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at two o'clock p.m., the jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Government's Case Continued:

Howard H. Whitsett, heretofore sworn, is now recalled and further examined on behalf of the Government.

Government's Exhibit 36, photostat, is now admitted in evidence.

Whereupon, the Government rests.

And thereupon, at 4:10 o'clock p.m., It Is Ordered that the jury, being first duly admonished by the Court, is excused until Tuesday, September 14, 1954, at ten o'clock a.m.

The jury having withdrawn from the courtroom, the defendant and all counsel being present, counsel for the defendant now moves for a directed verdict.

Said motion is duly argued by respective counsel.

The Court reserves ruling on defendant's motion to strike from evidence all evidence relating to "Net Worth Theory" should defendant's motion for a directed verdict be denied.

It Is Ordered that the further trial of this case be continued to Tuesday, September 14, 1954, at 9:30 o'clock a.m., to which time the defendant and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF TUESDAY,
SEPTEMBER 14, 1954

Honorable James A. Walsh, United States District Judge, Presiding.

At 9:30 o'clock a.m., Robert O. Royston, Esquire, Assistant United States Attorney, and Mary Anne Reimann, Esquire, Assistant United States Attorney, are present for the Government. The defendant is present in person with his counsel, Darrell Parker, Esquire, and

It Is Ordered that defendant's motion for judgment of acquittal is denied, and It Is Further Ordered that defendant's motion to proceed without the "Net Worth Theory" is denied.

Thereupon, at ten o'clock a.m., the jury, and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Defendant's Case

Bertha A. Lutfy is now sworn and examined on behalf of the defendant.

The following defendant's exhibits are now admitted in evidence:

- C. Certified copy Inventory and Appraisment.
- D. Certified copy Western Union Money Order.
- E. Letter.
- F. Copy of Letter.

Counsel now stipulate that if Otto Linsenmeyer were called to testify his testimony would be substantially the same as that of Howard Linsenmeyer.

And thereupon, at 11:50 a.m., It Is Ordered that the further trial of this case be continued to two o'clock p.m., this date, to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at two o'clock p.m., the jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

The following defendant's witnesses are now sworn and examined:

N. Clyde Pierce.

R. Dale Moser.

The following defendant's exhibits are now admitted in evidence:

- G. Net Worth Statement.
- H. Schedule.
- I. Cancelled check.

Nadine M. Patterson is now sworn and examined on behalf of the defendant.

And thereupon, at 4:25 o'clock p.m., It Is Or-

dered that the further trial of this case be continued to Wednesday, September 15, 1954, at ten o'clock a.m., to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF WEDNESDAY,
SEPTEMBER 15, 1954

(Tucson Division)

Honorable James A. Walsh, United States District
Judge, Presiding.

The Jury, and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Defendant's Case Continued:

R. Dale Moser, heretofore sworn, is now recalled and further examined on behalf of the defendant.

And thereupon, at 12:00 o'clock noon, It Is Ordered that the further trial of this case be continued to 2:00 o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at 2:00 o'clock p.m., the Jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case Continued:

The following witnesses are now sworn and examined on behalf of the defendant:

C. W. Pensinger,
Temple F. Penrod,
Arthur Lee Phelps,
Father Thomas V. Savage.

Counsel for the defendant renews his motion for judgment of acquittal.

And the defendant rests.

Both sides rest.

And thereupon, at 2:40 o'clock p.m., It Is Ordered that the Jury, being first duly admonished by the Court, is excused until Thursday, September 16, 1954, at 9:00 o'clock a.m.

The Jury having withdrawn from the Courtroom, the defendant and all counsel being present, counsel for the defendant renews defendant's motion for judgment of acquittal.

The Court reserves ruling on said motion, and

It Is Ordered that the further trial of this case be continued to Thursday, September 16, 1954, at nine o'clock a.m., to which time the defendant and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
SEPTEMBER 16, 1954

Honorable James A. Walsh, United States District Judge, Presiding.

The Jury, and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

All the evidence being in, the case is argued by respective counsel to the Jury. Whereupon, the Court duly instructs the Jury and said Jury retire at 12:05 p.m. in charge of a sworn bailiff to consider of their verdict.

It Is Ordered that the Marshal provide meals for said Jury and their bailiffs during the deliberation of this case at the expense of the United States.

Subsequently, the defendant and all counsel being present, the Jury return in a body into open Court at 2:40 o'clock p.m., and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict, to wit:

C-14525 Tucson

UNITED STATES OF AMERICA,

Plaintiff,

Against

LOUIS P. LUTFY,

Defendant.

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Louis P. Lutfy, Guilty as charged in Count One; Guilty as charged in Count Two; Guilty as charged in Count Three; Guilty as charged in Count Four; Guilty as charged in Count Five.

FRANK B. ROE,

Foreman.

It Is Ordered that the Jury is discharged from the further consideration of this case and excused until further order.

It Is Further Ordered that this case is set for sentence on Monday, October 11, 1954, at 10:00 o'clock a.m. and that said defendant be released upon his present bond until said date.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Louis P. Lutfy, Guilty as charged in Count One; Guilty as charged in Count Two; Guilty as charged in Count Three; Guilty as charged in Count Four; Guilty as charged in Count Five.

/s/ FRANK B. ROE,
Foreman.

[Endorsed]: Filed September 16, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the above-named defendant, by his attorneys undersigned, and respectfully moves the above-entitled Court that an order be made and en-

tered herein granting a new trial in this cause for the reasons and upon the grounds following:

1. That the Court erred in denying defendant's motion for acquittal made at the conclusion of the Government's evidence.

2. That the Court erred in denying defendant's motion for acquittal made at the conclusion of all of the evidence in the case.

3. The jury's verdict is not supported by substantial evidence.

4. That the verdict of the jury is contrary to the weight of the evidence.

5. That the Court erred in failing to grant defendant's motion to strike all evidence of the Government relating to defendant's net worth.

6. That the Court erred in submitting the case to the jury upon the Government's net worth theory for the reason that the cause was not an appropriate one for the application of the net worth method of computation, and for the further reason that the Government failed to prove by competent evidence two essential elements relating to defendant's net worth at the beginning of the period involved, namely:

(a) Cash on hand, including uncashed checks on hand; and

(b) Cash values of life insurance in force at the beginning of the said period.

7. That the Court erred in submitting the cause to the jury upon the Government's net worth theory for the reason that the Government failed to establish that all monies available to defendant for expenditure during the period in question, that is, from December 31, 1945, to December 31, 1948, was derived from taxable sources; and, on the contrary, defendant proved without contradiction that substantial sums which became available to him during said period were from non-taxable sources.

8. That the Court erred in overruling objections to the introduction of evidence relating to defendant's depreciation schedules for the prosecution years, for the reason that the same were outside the scope and contrary to the specifications contained in the Government's Bill of Particulars, as amended, and the Government's supplement thereto entitled "Government's Reply to Defendant's Motion for Further Particulars," upon the principle that the inclusion of the specific excludes the general.

9. That the Court erred generally in overruling defendant's objections seeking to limit Government's evidence to the scope of the Bill of Particulars, amendment and supplement thereto.

10. That the Court erred specifically in its refusal to direct a verdict at the conclusion of the Government's evidence for the reason that the Government had produced no competent testimony independently of the claimed admission of the defendant respecting the amount of cash on hand at the beginning of the net worth period, and for the further

reason that the amount claimed by the Government to have been cash on hand at the beginning of the said period was obviously and on its face an arbitrary figure.

11. That the Court erred to the prejudice of the defendant in overruling defendant's objections to testimony pertaining to the making of tax returns and the payment or nonpayment of taxes over a long period of years preceding 1945, including the admission, over objection, of Government's Exhibits No. 6 and No. 13 in evidence.

12. That the Court erred to the prejudice of the defendant in overruling defendant's objections to Government's Exhibit No. 10 in evidence.

13. That the Court erred in admitting in evidence, over defendant's objection, Government's Exhibit No. 27, being the depreciation work sheet, for the reason that the same was not within the Bill of Particulars and amendments thereto.

14. That the Court erred in admitting into evidence Government's Exhibit No. 33, being the Government's net worth statement, for the reason that said cause was not an appropriate case for the application of the net worth formula.

Dated this 20th day of September, 1954.

PARKER & MUECKE,

By /s/ DARRELL R. PARKER,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 20, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY,
SEPTEMBER 20, 1954

Honorable James A. Walsh, United States District
Judge, Presiding.

It Is Ordered that defendant's motion for an order authorizing the defendant to supplement the grounds for a new trial is granted and that the defendant have until the close of business on October 5, 1954, within which to file supplemental grounds in support of defendant's motion for new trial.

It Is Further Ordered that the order heretofore entered setting this case for sentence on October 11, 1954, is vacated and that this case is reset for sentence on Monday, October 18, 1954, at ten o'clock a.m.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY,
OCTOBER 18, 1954
(Tucson Division)

Honorable James A. Walsh, United States District
Judge, Presiding.

This case comes on regularly this day for hearing on defendant's Motion for a New Trial and for sentence. Robert O. Royston, Esquire, Assistant United States Attorney, and Mary Anne Reimann, Esquire,

Assistant United States Attorney, appear on behalf of the Government. The defendant is present in person with his counsel, Darrell Parker, Esquire.

Defendant's Motion for a New Trial is submitted by counsel for the defendant, and

It Is Ordered that said motion is denied.

The defendant is now afforded an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment, and thereupon no legal cause appearing why judgment should not now be imposed, the Court renders judgment herein.

In the District Court of the United States
for the District of Arizona

No. C-14525 Tucson

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS P. LUTFY,

Defendant.

JUDGMENT AND COMMITMENT

On this 18th day of October, 1954, came the attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and verdict of

Guilty of the offense of violating Title 26, United States Code, Section 145(b), attempt to defeat and evade income tax, as charged in Counts 1, 2, 3, 4 and 5 of the Indictment herein.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eight (8) months on Count One and eight (8) months on each of Counts Two, Three and Four, said terms of imprisonment to run concurrently with each other and with the sentence imposed on Count One; and fined in the sum of \$5,000.00 on Count Five.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Dated at Tucson, Arizona, October 18, 1954.

/s/ JAMES A. WALSH,
United States District Judge.

[Endorsed]: Filed and docketed October 18, 1954.

[Title of District Court and Cause.]

ORDER GRANTING STAY OF EXECUTION
AND ADMITTING TO BAIL ON APPEAL

Defendant herein having filed notice of appeal from the jury's verdict and judgment and sentence of this Court, and it appearing to the Court that probable cause exists for such appeal, and the Court finding good cause why said defendant should be admitted to bail pending the final disposition of such appeal;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed staying the execution of the sentence imposed upon the said defendant on October 18, 1954, and admitting the defendant to bail pending final disposition of his appeal herein, and directing that defendant furnish or file herein a bond, in cash or otherwise, conditioned in the usual manner in such cases, in the amount of Five Thousand and no/100 Dollars, and that upon the furnishing of such bond the said defendant be at liberty until final disposition of his said appeal.

Dated this 18th day of October, 1954.

/s/ JAMES A. WALSH,
Judge.

[Endorsed]: Filed October 18, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Clerk of the United States District Court
for the District of Arizona:

You Are Hereby Notified that Louis P. Lutfy, defendant in the above-entitled cause, residing at 125 East Missouri Avenue, in the City of Phoenix, County of Maricopa, State of Arizona, by and with his attorney, Darrell R. Parker, residing at 713 West Palm Lane, in the said City of Phoenix, County of Maricopa, State of Arizona, and having offices at 310 Luhrs Tower, in the said City of Phoenix, County of Maricopa, State of Arizona, under-signed, hereby gives notice of appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from the verdict of the jury made and rendered herein on September 17, 1954, finding the defendant guilty as charged in Counts I, II, III, IV and V of the Indictment herein, and the order denying defendant's Motion for a New Trial entered herein on October 18, 1954, and the judgment rendered thereon on October 18, 1954, by the United States District Court for the District of Arizona imposing the following sentence, to wit: 8 months on each count (concurrent) and \$5,000.00 fine.

General Statement of Offense: (Using tax computations testified to by Revenue Agent upon the trial of the cause which were substantially less than

the amounts alleged in the various Counts of the Indictment):

Count I—filing false and fraudulent income tax return for the year 1946 on his own behalf showing tax due \$248.88, whereas the amount owing was \$1,073.57.

Count II—filing false and fraudulent income tax return on behalf of his wife, Bertha A. Lutfy for the calendar year 1946 showing tax due \$153.88, whereas the amount actually due was \$950.70.

Count III—filing false and fraudulent income tax return on his own behalf for the calendar year 1947, showing tax owed \$626.03, whereas the amount actually owed was \$2,471.42.

Count IV—filing false and fraudulent income tax return of defendant's wife, Bertha A. Lutfy, for the calendar year 1947 showing amount of tax owing \$521.53, whereas the amount actually owed was \$2,309.92.

Count V—filing false and fraudulent joint income tax return covering income of defendant and his wife, Bertha A. Lutfy, for the calendar year 1948, showing amount of tax owed \$3,265.36, whereas the amount of tax actually due was \$6,362.20; all in violation of Section 145(b), Internal Revenue Code; U. S. C. Sec. 145(b).

The present place of confinement of the said defendant is.

Dated this 18th day of October, 1954.

/s/ LOUIS P. LUTFY,
Defendant;

/s/ DARRELL R. PARKER,
Attorney for Defendant.

[Endorsed]: Filed October 18, 1954.

[Title of District Court and Cause.]

CRIMINAL DOCKET

Proceedings

1953

* * *

Mar. 12 Deposit \$2,000 deft's. cash bail in Registry Fund.

* * *

1954

Oct. 18 Deposit \$3,000.00 cash bail in Registry Fund pending appeal.

* * *

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
NOVEMBER 18, 1954

Honorable James A. Walsh, United States District
Judge, Presiding.

It Is Ordered that the time to file the record on
appeal herein with the United States Court of Ap-

peals for the Ninth Circuit at San Francisco, California, is extended to and including Tuesday, January 4, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKET-
ING APPEAL AND TRANSMITTING
RECORD

Upon motion of counsel for the above-named defendant-appellant:

It Is Ordered that appellant's time for filing the transcript of record on appeal herein and docketing said proceeding in the United States Court of Appeals for the Ninth Circuit be, and it is hereby, extended to and including January 17, 1955.

Done in Open Court this 15th day of December, 1954.

/s/ JAMES A. WALSH,
Judge.

[Endorsed]: Filed December 15, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
DEFENDANT-APPELLANT RELIES ON
APPEAL

The points upon which Defendant-Appellant relies in this Appeal are as follows:

1. The District Court erred in the admission of evidence concerning defendant's net worth over the

period of prosecution, for the reason that defendant by the undisputed testimony of witnesses kept and maintained in said period a regular set of books and the employment of the net worth method of computation was improper and without authority of law, with the consequence:

A. That the District Court erred in denying defendant's Motion for Judgment of Acquittal at the conclusion of the Government's evidence.

B. That the District Court erred in denying the defendant's Motion for Judgment of Acquittal at the conclusion of all the evidence in the case.

C. That the District Court erred in denying defendant's Motion to Strike all of the Government's evidence and exhibits relating to defendant's net worth.

D. That the District Court erred in submitting the case to the jury upon the Government's net worth theory of computation.

E. That the District Court erred specifically in admitting into evidence the Government's Exhibit 33, being the Government's net worth statement.

2. That the District Court erred in denying defendant's Motions for Judgment of Acquittal and in submitting the case to the jury upon the "net worth theory," for the reason that the Government failed to prove by competent evidence certain essential elements relating to defendant's net worth at the beginning of the prosecution period and during same.

A. Cash on hand at beginning of period including uncashed checks on hand.

B. Cash values of life insurance in force at the beginning of the said period and at the end of the last of the prosecution years.

C. Funds received by defendant during prosecution years in the form of gifts; that in this connection the Government failed to establish that all monies available to defendant for expenditure during the period in question, that is, December 31, 1945, to December 31, 1948, was derived from taxable sources; and, on the contrary, defendant proved without contradiction that substantial sums which became available to him during said period were from non-taxable sources.

3. That the District Court erred generally in overruling defendant's objections seeking to limit the Government's evidence to the scope of the Bill of Particulars, Amendment and Supplement thereto:

A. That the District Court erred in overruling objections to the introduction of evidence relating to defendant's depreciation schedules for the prosecution years, for the reason that the same were outside the scope of the specifications contained in the Government's Bill of Particulars as amended and supplemented upon the principle that the exclusion of the specific excludes the general.

B. That the District Court erred in admitting in evidence, over defendant's objection, Government's Exhibit No. 27, being a depreciation work

sheet, for the reason that the same was not within the Bill of Particulars and Amendments and Supplements thereto.

4. That the District Court erred to the prejudice of the defendant and thereby deprived defendant of a fair trial by:

A. Admitting in evidence, over defendant's objection, Government's Exhibit No. 6, being the assessment list and/or record of tax payments covering a long period of years prior to years involved in the indictment.

B. That the District Court erred to the prejudice of the defendant in admitting in evidence, over defendant's objection, Government's Exhibit No. 13, being an assessment and payment record of defendant covering a period of years long prior to the prosecution years.

C. That the District Court erred in admitting in evidence, over defendant's objection, Government's Exhibit No. 7, being defendant's 1945 income tax return.

D. That the District Court erred in admitting in evidence, over objection, Government's Exhibit No. 10, being ledger sheet of old bank account of defendant in Bank of Arizona many years prior to years involved in the prosecution.

Dated this 22nd day of October, 1954.

/s/ DARRELL R. PARKER,
Attorney for Defendant.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY,
JANUARY 10, 1955

Honorable James A. Walsh, United States District
Judge, Presiding.

It Is Ordered that the time for docketing the record on appeal herein with the United States Court of Appeals for the Ninth Circuit at San Francisco, California, is extended to and including Tuesday, February 1, 1955.

In the District Court of the United States
for the District of Arizona

No. C 14525—Tucson

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS P. LUTFY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances:

Mr. Robert Royston, Assistant United States Attorney, and Miss Mary Anne Reimann, Assistant United States Attorney, for the plaintiff.

Mr. Darrell Parker, for the defendant.

The above-entitled case came on for trial on the 7th day of September, 1954, in the District Court of the United States for the District of Arizona, at Tucson, Arizona, before the Honorable James A. Walsh, Judge, and a Jury and the following proceedings were had, to wit:

HUGH McGUCKIN,
called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Roylston

* * *

Q. (By Mr. Roylston): Mr. McGuckin, did you bring a certificate of assessments and payments certified to by the District Director of Internal Revenue?

A. Yes.

Q. These are certified to by the Acting District Director of Internal Revenue, is that correct?

A. That is right.

Mr. Roylston: Would you mark those for identification, please. They can all be marked as one.

(Government's Exhibit 6 marked for identification.)

Mr. Roylston: I offer Government's Exhibit 6 for identification which is a certified copy, certified to by the Acting District Director of Internal Revenue. I offer that in evidence. [3*]

Mr. Parker: If your Honor please, with refer-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Hugh McGuckin.)

ence to this offered Exhibit 6 for identification, which consists of three sheets, I will confess to the Court I am unable to see the materiality of two of the sheets. The last one appears to have some relevancy but the balance of the Exhibit I object to upon the ground it is irrelevant to any issue in this case.

The Court: You have no objection to the last sheet, Mr. Parker?

Mr. Parker: No, your Honor, I see the relevancy of the last sheet.

Mr. Roylston: The first two sheets are offered as evidence tending to establish a starting point to establish the defendant's net worth.

Mr. Parker: If your Honor please, I am aware of that, I think the Court is too, but I think it is very poor evidence. During that time, as your Honor knows, the law was changed several times and it may or may not be of much probative value. Certainly there would be a more direct and far better way to get at it and I persist in my objection of the first two sheets.

The Court: Well, it will be admitted. [4]

* * *

Q. (By Mr. Roylston): Referring to Government's Exhibit 6 in evidence, on the first page of that document after the years 1929 through 1933 are the initials "N.C." Would you explain what those initials mean, Mr. McGuckin?

A. That means no return filed.

(Testimony of Hugh McGuckin.)

Q. It means what? A. No return filed.

Q. No return was filed? [5]

A. It means no cards——

Mr. Parker: If your Honor please, this is not relevant to any issue in this case and goes back years and years before. I move the Court that the last answer be stricken and that the jury be admonished to disregard it and I again reiterate that I sincerely believe these matters are very far afield from the issues in this case.

The Court: The objection will be sustained. The answer of the witness to the last question will be stricken and the jury will disregard it.

Mr. Royston: That is all.

Cross-Examination

By Mr. Parker:

Q. Did I understand you are stationed at the Tucson office of the Internal Revenue Service?

A. Starting today.

Q. Heretofore you have been in Phoenix?

A. Yes.

Q. What is your title, do you have a title?

A. My present title is Deputy Collection Officer.

Q. Deputy Collection Officer?

A. Collection Officer.

Q. That is not the same as Deputy Collector?

A. That is the new name for Deputy Collector.

Q. The title now is officially Director of Internal Revenue, isn't it, instead of Collector? [6]

A. That is right.

(Testimony of Hugh McGuckin.)

Q. You are not the first assistant to the Director?

A. No. I have a letter from the Director permitting me to be here in his place.

Q. I understand that you are here by his request?

A. Yes. [7]

* * *

HOWARD LINSENMEYER,
called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Royston: [20]

* * *

Q. You are a brother to Mrs. Lutfy, Bertha Lutfy?

A. That is correct.

Q. You have known the doctor for some matter of years then, is that correct?

A. Yes, I have.

Q. Do you know approximately how long your sister has been married to Dr. Lutfy?

A. In the neighborhood of sixteen years.

Q. I will ask you—will you state your mother's name?

A. Otilia Linsenmeyer.

Q. Is your mother presently living?

A. No, she died in 1951.

Q. She is also the mother of Bertha, you are full brother and sister?

A. Yes.

Q. Will you state of your own knowledge whether you know of any gifts being given by your mother to the sister Bertha during the period 1946, 1947 and 1948?

(Testimony of Howard Linsenmeyer.)

A. You mean material gifts——

Q. Any gifts of property, money or cash, anything along that line?

Q. Well, I know my mother gave each of us children \$100 on our birthday; and I believe it was in 1946 she gave five of us children an undivided one-fifth interest in approximately five acres of ground at 16th Street and Roosevelt [21] in Phoenix. [22]

* * *

Cross-Examination

By Mr. Parker:

Q. When did your mother die?

A. In 1951.

Q. And how many children did your mother have surviving?

A. There were eight of us children and one sister was killed in an automobile accident in 1935, I believe.

Q. And there were seven then surviving at the time of your mother's death?

A. That is correct.

Q. Do you recollect the size estate your mother left upon her death?

Mr. Royston: I object to that as immaterial if it was in 1951.

The Court: He may answer.

A. The government appraisal on it for inheritance tax purposes, it was roughly \$900,000.

Q. Was that estate distributed entirely to you children, the seven children?

(Testimony of Howard Linsenmeyer.)

A. That is correct.

Q. Now, Mr. Linsenmeyer, had your mother had most of this money and property for a number of years prior to her death?

A. Well, my father accumulated all of it then my mother [23] held it together.

Q. And she held it together from the date of his death in the early thirties until her death in 1951?

A. That is correct.

Q. Mr. Linsenmeyer, do you recollect that your mother was in the habit of having large amounts of cash available most of the time from rentals and securities and other sources?

A. Well, I didn't know much of my mother's personal business but I would presume that she did have rentals and one thing and another around the house.

Q. Do you recollect that after her death that rentals appeared there in the estate of something like \$40,000 a year?

A. That is correct. [24]

* * *

Q. Do you know of your own knowledge that over the years and particularly the years '45, '46, '47, and '48 that she followed that practice in order to avoid friction in the family between the children?

A. Well, that is true, yes.

Q. Then you in accordance with that practice which your mother followed you would not ordinarily be told by her of the gifts she may have made to your sister, Bertha, would you?

(Testimony of Howard Linsenmeyer.)

A. No, I would have no way of knowing.

Q. So when you testified that you knew of no sizeable gifts, that simply means you have no knowledge of any sizeable gifts?

A. That is correct.

Q. You are not suggesting to the Court or jury that there may not have been sizeable gifts, are you, Mr. Linsenmeyer?

A. No. [25]

* * *

CLARENCE J. BEALE

called as a witness herein, having been first duly sworn, testified as follows: [31]

Direct Examination

By Mr. Royston:

Q. State your name, please.

A. Clarence J. Beale.

Q. Where are you employed, Mr. Beale?

A. At this time?

Q. Yes, sir, at the present time?

A. I am employed by Verde Exploration Limited, Jerome, Arizona.

Q. And how long have you been employed at Verde Exploration Limited?

A. Since their company was created along about 1947, first of the year I think it was created.

Q. And what type work do you do in connection with that company, Mr. Beale?

A. I am assistant treasurer and Arizona agent.

(Testimony of Clarence J. Beale.)

Q. And in your employment do you have custody of the company records?

A. All of the previous companies, two of them, the old United Verde Extension and the Clemenceau Mining Corporation, which took over the Extension, then we took over from them. All the records are now in our possession, everything.

Q. You are the custodian of those records, is that correct?

A. Yes, sir, I am.

Q. Are these the records here of that company? Can you tell from there without examining them any closer? [32]

A. That is right.

Q. You brought these into Court?

A. That is right. There are sections of the mine and smelter payrolls of the old United Verde Extension Mining Company during the period approximately when Dr. Lutfy was one of our company doctors.

Q. I will ask you whether or not you examined these records and prepared any document from the records?

A. Yes. I left it there in my seat.

Mr. Parker: If your Honor please, I am under the impression this relates to a period almost twenty years ago and if I am not in error on that I am a total loss to understand its relevancy. If I might ask the witness a question voir dire I think we might get at that point.

The Court: I take it, Mr. Parker, if what you say be true it is all part of the effort to build up a starting net worth.

Mr. Parker: Your Honor, a net worth would

(Testimony of Clarence J. Beale.)

have to be found in terms of tangible property as of the beginning of the period. Now, how this sort of thing could be of any relevancy at all is very difficult for me to understand. We have entered into a very extensive stipulation here concerning certain properties which were owned by the defendant in 1944, '45, and so forth, and this thing seems to me to be so much more remote and indirect than the stipulation which has already [33] been signed and filed in this case. I don't understand it. If we didn't have tangible property about which we have quite freely stipulated——

The Court: I don't understand there is any stipulation.

Mr. Parker: We admit we stipulated to everything the government has asked for regarding tangible property that I know of.

Mr. Roylston: We couldn't get a stipulation as to cash on hand in order to establish the starting point of net worth.

Mr. Parker: The point of it is, what Dr. Lutfy made in the form a salary for the U.V.X. eighteen or twenty years ago wouldn't have very much bearing on how much money he had in his pocket on December 31st, 1945.

Mr. Roylston: If we could reach a stipulation as to cash on hand——

Mr. Parker: The only reason we can't is because we don't know. At one time we were guessing in terms of \$500 and it was purely arbitrary. We have

(Testimony of Clarence J. Beale.)

no more basis—if you could give us a basis or we could give you a basis we would agree with you, but we don't know. That is purely speculative.

Mr. Royston: That is what I am doing now.

Mr. Parker: You are not going to do that this way, I assume. [34]

The Court: I don't think there would be any dispute but what this wouldn't prove it, but it may be a part of an entire picture.

Mr. Parker: I don't want to obstruct the Government's case but it seems so extremely remote and far fetched and of little or no probative value. It would have to be bulwarked by a whole lot of collateral proof to give it any probative value whatsoever. I might have made \$500 a month or \$200 a month two years ago and maybe I didn't keep it long enough to warm it up in my pants pocket, but the fact that I made it wouldn't prove a thing as to how much I had in terms of property in 1945 or '46.

The Court: Well, we will pass on it when it comes up.

Mr. Parker: All right.

Q. (By Mr. Royston): These documents you have in your hands now, where did you obtain those documents, sir?

A. Where did I obtain them?

Q. Yes.

A. In the files of the present company.

Q. That was obtained from these records over here?

A. This recapitulation here, after I dug those

(Testimony of Clarence J. Beale.)

payrolls out, all five hundred pounds of payrolls piled up there, I took those sections out. The purpose of that which I have recapitulated here is to show the amount of money that was paid to Dr. Lutfy for medical services to our employees [35] over and above what they were entitled to by payment of a monthly fee. And that is what the record shows, that card on the front shows what his salary was during those periods.

Mr. Royston: Would you mark this as an Exhibit, one Exhibit, the contents of this envelope?

The Witness: It is Dr. Lutfy's card. I brought these along to show it is one of all of them.

(Government's Exhibit 9 marked for identification.)

Q. (By Mr. Royston): You stated this was taken from the records of the mining company up there, is that correct? A. That is right.

Q. That was taken from these records which are lying on the table?

A. The deductions which I have recapitulated there were taken from those payroll records showing what was deducted from the various employees for his account.

Q. These items listed here were taken from the company records? A. That is right.

Mr. Royston: Then I offer Government's Exhibit 9 for identification into evidence, if it please the Court.

(Testimony of Clarence J. Beale.)

Mr. Parker: I should like, your Honor, to ask Mr. Beale a few questions on voir dire.

The Court: Very well.

Q. (By Mr. Parker): Mr. Beale, these records here refer [36] to certain income from the mining company, do they not?

A. Those typewritten figures?

Q. Well, the typewritten figures as I understand it are certain deductions from employee's wages where they received medical services or surgical services over and above what they would be entitled to for their regular——

A. That is right.

Q. ——deductions?

A. I simply took those figures right off of those payrolls.

Q. Then on this top card there is an indication what Dr. Lutfy's salary was in a period 1934 and '35?

A. That is right.

Q. From the mining company?

A. That is right. That is his salary.

Q. Yes, that was salary. Now, as I understand it he was also employed by the smelter?

A. Well, that card showing what his salary was covers the period when I think the doctor went down to our smelter medical office at the start and later came up and took over in Jerome. That card refers to his total employment, whether at the mine or the smelter. In other words, they change back and forwards those doctors. It was no consequence where they happened to be parked, whether at Jerome or in Clemenceau.

(Testimony of Clarence J. Beale.)

Q. Did he also practice medicine privately in addition to his employment with the companies? [37]

A. I would have no knowledge of that.

Q. You were there at the time and you remember him, don't you?

A. Oh, yes. I contacted the doctor very often.

Q. He was there about how long?

A. Well, apparently that record, from September I think until the following—approximately a year I would think, whatever the record shows there.

Q. This all occurred in 1934 and '35?

A. That is right.

Q. Almost twenty years ago?

A. That is right.

Q. Do you know whether or not he had a salary from the county, from Yavapai County?

A. I couldn't answer that. No, I do not.

Q. Do you know whether he had any income from the State School Board or State Board of Education?

A. No, I have no knowledge of it.

Q. Your position there at the time Dr. Lutfy was in Jerome was what, Mr. Beale?

A. Well, I did the hiring and handled the personal injury cases of the two townsites and other odd jobs that nobody else wanted. And in that connection with the personal injury cases I saw the doctor almost daily.

Q. Did you keep the payroll at that time? [38]

A. I had supervision over the time office also but I didn't actually work on the payroll, but I had

(Testimony of Clarence J. Beale.)

one general clerk and one who took care of the payroll. A timekeeper checked the men on and off and there was a boy there that helped with the rental cards and pitched in on the payroll, but I never worked on the payroll myself.

Q. Were you in charge, for instance, of paying Dr. Lutfy, did you have anything to do with that?

A. No. The doctor was on a salary and for some reason the management saw fit to keep a small payroll of, oh, the mine superintendent, smelter superintendent and chief surgeon and the other doctors. In my own case sometimes they had me on it, sometimes they had my name on the main payroll along with everybody else. I don't know what the purpose was. That payroll has been lost. I searched high and low and I couldn't find it. However, those cards very clearly indicate what the salary was the doctor received.

Q. If I understand, you had no duties with reference to making any records or keeping any records of Dr. Lutfy's pay or his salary or fees?

A. No. As I say, he was kept on this little payroll which was kept in the main office by the cashier or bookkeeper or office manager.

Mr. Parker: If it please the Court, I still fail to see the materiality of it and at the present time I doubt the [39] competency of it for want of proper identification.

The Court: May I see it, please?

Q. (By the Court): Mr. Beale, what you have in those rolls there, are those all of the payroll

(Testimony of Clarence J. Beale.)

records for all of the mining company employees during the period '34, '35, and '36?

A. Those sections of both of the mine and the smelter which are divided there cover all the period of all the employees except the Dr. Lutfy and, as I say, a few salaried men; and I simply took out the individual sheets and all the sheets for any given month showed a deduction from an employee in favor of Dr. Lutfy.

Q. The only sheets you have in those rolls are the ones you found that showed a deduction on behalf of Dr. Lutfy?

A. That is right.

Q. The others are——

A. They are all there in the vault at home. Of course they are irrelevant as far as the showing the deductions for Dr. Lutfy and weigh several hundred pounds. Naturally I didn't pack the whole works down here.

The Court: Are you offering this, Mr. Royston?

Mr. Royston: I might ask one further question.

Q. (By Mr. Royston): The card that is on the front there, the little white card, that was a card kept in the regular course of business of the mine up there? [40]

A. That was kept, and I recognize the handwriting or figuring on it of a man named Smith who was office manager, cashier and head of the main office. I was exchanging reports with him daily over twenty odd years, I know his figures. I know he made that record. As I look through these I recognize lots of others kept by him and some by

(Testimony of Clarence J. Beale.)

others I wouldn't attempt to identify them all but I know Smith kept that record.

Q. In the regular course of business there at the mine?

A. Regular course of business, certainly, and it is just as good an indication—you know the doctor didn't work there that period without being paid whether I have the payroll or not.

Mr. Roylston: I offer that Exhibit 9 for identification into evidence, your Honor.

The Court: Were there some records concerning a fellow named Hilton—

A. He was another doctor.

The Court: Somebody named Kirkland.

A. He was the chief surgeon.

Mr. Roylston: If those may be removed?

The Court: When I can examine this further I will rule on it then.

Mr. Roylston: No further questions.

Mr. Parker: That is all. [41]

JOHN L. FAIRFIELD

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Roylston:

Q. State your name, please.

A. John L. Fairfield.

Q. What is your occupation, Mr. Fairfield?

(Testimony of John L. Fairfield.)

A. I am manager of the Verde Valley Branch of the Bank of Arizona located at Cottonwood, Arizona.

Q. How long have you been so employed?

A. I have been employed with the Bank of Arizona since January 2nd, 1945; I have been manager for a little over three years of that office.

Mr. Royston: Could I have this record you brought with you, would you mark that for identification, please?

(Government's Exhibit 10 marked for identification.)

Q. (By Mr. Royston): Referring to this Government's Exhibit 10 for identification I will ask you where you obtained that document, Mr. Fairfield?

A. From our records which we have. Perhaps I should go back a little. This record, this account was maintained with the Bank of Arizona at Clarkdale, however, January 25th of this year all the branch bank in that area was moved to Cottonwood and all these records are now stored, some in Cottonwood and some in Clarkdale where we still have a facility. [42]

Q. This was a record then of the bank——

A. At Clarkdale.

Q. At Clarkdale? A. That is right.

Q. By examining that document can you state whether or not that was a record kept in the regular course of business there at the bank?

(Testimony of John L. Fairfield.)

A. Yes, all ledger sheets are permanent records.

Q. It was there in the custody of the bank at the time you obtained it, is that correct? A. Yes.

Mr. Royston: I offer Government's Exhibit 10 for identification into evidence.

Voir Dire Examination

By Mr. Parker:

Q. Mr. Fairfield, have you examined this Exhibit that is now being offered, closely?

A. Just casually in getting it from our records.

Q. You observed it is just a small checking account, did you not? A. That is true.

Q. Of course you would have no way of knowing whether or not Dr. Lutfy at the time he maintained this account did most of his business with the Phoenix bank? A. I would not know. [43]

Q. You have made no investigation to determine if he had other bank accounts at the same time this small checking account existed?

A. I have not.

Mr. Royston: I offer Government's Exhibit 10 for identification into evidence.

Mr. Parker: For the sake of the record I would like to preserve the objection for relevancy that was previously made.

The Court: Might I see it, please?

Mr. Parker: Also the objection predicated upon lack of a complete foundation and lack of probative

(Testimony of John L. Fairfield.)

value as far as any issues in this case are concerned. I might call your Honor's attention to the fact it is obvious this bank account does not correspond even to the income which Dr. Lutfy had during that period.

The Court: It will be admitted for whatever it may be worth. [44]

* * *

ROBERT F. HERRE

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Roylston:

Q. Your name is Robert F. Herre?

A. Robert F. Herre.

Q. What is your occupation, Mr. Herre?

A. I am a special agent for the Bureau of Internal Revenue.

Q. Would you speak just the least bit louder. Where are you stationed at the present time?

A. St. Louis. [50]

Q. How long have you been stationed at St. Louis? A. Since the Spring of 1948.

Q. In connection with your work as an agent of the Internal Revenue, Bureau of Internal Revenue, did you have occasion to conduct any investigation in relation to Dr. Lutfy? A. I did.

Q. And when was this investigation conducted?

(Testimony of Robert F. Herre.)

A. During the latter part of 1953 and first half of 1954.

Q. Who directed you to conduct any investigation?
A. The special agent, Lloyd Tucker.

Q. What general type of investigation were you to conduct?

A. A searching investigation, the files of the Director's office at St. Louis were searched for filing of income tax returns in the case of Lutfy.

Q. Did you conduct that search yourself?

A. I did.

Q. And do you have a certificate of assessments and payments?
A. I do.

Mr. Royston: May this be marked?

(Government's Exhibit 13 marked for identification.)

Mr. Royston: This Government's Exhibit 13 headed Certificate of Assessments and Payments, certified to by the Assistant District Director of Internal Revenue, I will offer [51] in evidence at this time.

Mr. Parker: If your Honor please, does the Court have a copy of this?

The Court: I think I have the original. I think you have the copy.

Mr. Parker: I am reluctant to suggest that we are now approaching the ridiculous. This covers a period when he was in college, way back in the 1920's before he ever started any professional prac-

(Testimony of Robert F. Herre.)

tice in medicine. I fail utterly to see the materiality of it. I assume that it is offered on the theory that it is prejudicial. I know of no other theory upon which it could be offered.

Mr. Royston: I will assure the Court it isn't offered on that theory. It may seem ridiculous, but the only way I know to conduct this type of case is to go back and cover any period in which the defendant might have had any substantial amount of income. Even though he was in college or internship, other than this there is no way to show he may have had any income, he may have been making any fabulous amount so far as we know.

Mr. Parker: This doesn't show what his income was.

Mr. Royston: It shows he didn't file a tax return.

Mr. Parker: Well, now, we are debating over this exhibit and you are now stating to the jury what you think it shows. I don't recall filing a tax return when I was in [52] college either. I don't know what that has to do——

Mr. Royston: If it please the Court——

Mr. Parker: I doubt if Mr. Royston filed a tax return while he was in college.

Mr. Royston: That is correct.

Mr. Parker: But I don't think I would suggest that is material whether or not he properly filed for 1953.

Mr. Royston: If we are trying to establish my

(Testimony of Robert F. Herre.)

net worth in 1953 it certainly would be material whether I had any income a few years ago or any substantial income. It is offered solely for that basis, to overcome the probability of any substantial income during those years which might account for this great increase in net worth in later years.

Mr. Parker: I submit it doesn't prove anything.

Mr. Royston: It is offered.

Mr. Parker: He may have had a wealthy family and his earnings wouldn't make any difference. I don't think it is of any great significance, your Honor. It seems to me it goes far afield. If the Court feels it has any probative value, the Government is being deprived by not having this in. I am not going to object further to it but I am at a total loss to understand——

The Court: I don't know at this time whether it will be worth anything to the jury. However, I take it there will have to be a great deal more evidence before anybody can [53] determine that. I am going to admit it because I don't think there is any great prejudice. I don't see how there could be. That is 13 in evidence.

(Government's Exhibit 13 marked in evidence.)

Q. (By Mr. Royston): Mr. Herre, in connection with your investigation what was the next thing you did?

A. I contacted the St. Louis University Medical

(Testimony of Robert F. Herre.)

School and searched their records for anything that would be of significance in this case.

Q. For what particular years was that to cover?

A. That was to cover the years October, 1928, to June, 1932.

Q. Did you find any evidence of employment during the school years? A. No.

Q. What was the next thing you did in this investigation?

A. I determined the place of abode of Mr. Lutfy at the time he was attending St. Louis University. During part of that time he was staying at 3515 Park Avenue, which was a rooming house.

Q. All right, sir, and what else?

Mr. Parker: I take it, if your Honor please, this must all be hearsay. I don't see how it could be otherwise.

The Court: Are you objecting to it?

Mr. Parker: I do.

The Court: The objection will be sustained. [54]

Q. (By Mr. Royston): What was the next thing you did in your investigation, Mr. Herre?

A. All of the banks in St. Louis and all of the banks in St. Louis County surrounding the city of St. Louis were contacted to determine whether or not they had any business transactions of any kind whatsoever with Lutfy.

Q. What period of years was that to cover?

A. That covered the period 1928 to 1933.

Q. Were you able to discover any records in the banks in that area?

(Testimony of Robert F. Herre.)

A. There were no records.

Mr. Parker: Just a moment. The further objection on the ground it is hearsay.

The Court: The objection will be sustained. That's not proper, Mr. Royston, to have a witness come here and testify as to the existence or non-existence of records when he has just gone in there and inquired. The jury will disregard the last answer of the witness.

Mr. Royston: If it please the Court, it is my understanding that the only way the Internal Revenue could obtain any of those records was inquire for the specific records and if the banks report they don't have those records the only thing we can do is produce the agent to testify to that fact.

The Court: No, you can produce the people at the banks. They are the ones that have the knowledge. What they [55] tell this witness is strictly hearsay. How would counsel cross-examine a witness who appears as this one does. All he says is, "They told me they didn't have them."

Mr. Royston: Yes, sir.

The Court: Assuming counsel should have reason to believe there were some records, how in the world could he cross-examine this witness. If you had somebody from the bank there is a very effective way of cross-examining them.

Mr. Royston: There was about fifty banks in the area and I didn't think it would be incumbent for us to bring a representative from each bank to state there were no records.

(Testimony of Robert F. Herre.)

The Court: The fact it may be burdensome, Mr. Royston, it isn't any basis for hearsay evidence.

Mr. Royston: All right, sir, I won't let it go any further.

Q. (By Mr. Royston): Did you do anything further in your investigation, Mr. Herre?

A. The records of the city of St. Louis and St. Louis County pertaining to property transactions, liens, mortgages, chattel mortgages, were searched in an effort to find the name of Lutfy.

Q. Did you search those records yourself?

A. I personally searched the records.

Q. What were the results of your search?

A. They were negative. [56]

Q. You found no record?

A. I found no record of Lutfy.

Mr. Royston: Cross-examine.

Cross-Examination

By Mr. Parker:

Q. I take it you don't know Dr. Lutfy at all?

A. No, sir.

Q. Never saw him until yesterday?

A. That is correct.

Q. Never talked to him in your life?

A. No, sir.

Q. Just a name to you?

A. That is correct.

Mr. Parker: That is all.

Mr. Royston: Come down, Mr. Herre.

(Witness excused.)

CHARLES M. WIGHTMAN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Royston: [57]

* * *

A. This is a deposit slip of Louis P. Lutfy dated 11/24/44.

Q. And does it show what was deposited?

A. It was deposit proceeds of war bonds in the amount of \$14,195.12.

Q. Now, with reference to the remainder of the document what is that there in your left hand?

A. This is the ledger sheet of Louis Lutfy, M.D., includes the month of November, 1944.

Q. Now, can you state from examining that ledger sheet whether it shows this deposit which you state was reflected on the slip?

A. Yes, it does. It shows on November 24, 1944, the deposit for \$14,195.12 was put into the account of Louis P. Lutfy, M.D.

Q. Now, with reference to Government's Exhibit 12, I will ask you to examine those photostatic copies and state whether or not you can tell where those bonds were cashed? A. Yes, sir.

Q. Can you state where they were cashed?

A. Yes, sir.

Q. Where were they cashed?

A. Cashd at the Valley National Bank Head Office.

(Testimony of Charles M. Wightman.)

Q. That is your office there in Phoenix?

A. That is right, sir. [62]

* * *

FRED DONOVAN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Roylston: [65]

* * *

Mr. Parker: If you want that exhibit in it is all right with me.

Mr. Roylston: I don't care. If we can stipulate to it I will be more than glad to.

The Court: I can't read most of the notations. There is one I think would be entirely improper. Perhaps counsel had better see if——

Mr. Parker: I have here a list of these payments and dates which they made and the exact amount is there. And I am perfectly willing to stipulate to them and read them into the record.

Mr. Roylston: That will be fine with me.

Mr. Parker: "Payment made by Louis P. Lutfy to [67] Barrow's Furniture Company, February 6, 1947, \$142.55. February 27, 1947, \$50.95. May 13th, 1947, \$12.69. June 21st, 1947, \$17.75." Is that correct, counsel?

Mr. Roylston: Yes, sir, that is correct.

The Court: It is so stipulated?

(Testimony of Fred Donovan.)

Mr. Parker: Yes, your Honor.

Mr. Royston: Yes, your Honor.

The Court: Members of the jury, ordinarily when counsel makes a statement it is not any evidence it is just counsel's statement. However, when both counsel say that they stipulate upon a certain thing then the facts to which they stipulate must be taken by the jury to be true. In this particular instance they have just agreed on certain dates, the payments that were made by Dr. Lutfy to Barrow's Furniture. They have agreed on that and the jury must take that as true.

Q. (By Mr. Royston): Mr. Donovan, can you examine—without examining that record do you know what these purchases that have been stipulated to, what items these were purchases of?

A. What kind of purchase?

Q. Yes, what type merchandise?

A. I have no idea.

Q. What type merchandise does Barrow's Furniture carry?

A. Anything in the furniture line.

Q. Does it carry both office and home furnishings? [68]

A. Yes, it does.

Mr. Royston: No further questions.

Mr. Parker: No questions. [69]

* * *

MRS. MARGARET LARSON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Miss Reimann:

* * *

A. I am from Santa Barbara, California.

Q. Where are you employed over there?

A. I am employed by Westons Camera Store.

Q. How long have you been employed there?

A. Two and a half years.

Q. What is your position there?

A. Office manager.

Q. And you were subpoenaed to bring some records in regard to this case from the Westons Camera Shop, is that correct? A. Yes.

Q. Are these the records kept in the regular course of your business? A. Yes, they are.

Q. You have access to these records?

A. Yes.

Q. You are in charge of them?

A. Yes. [73]

Q. You didn't bring the complete ledger sheet on Dr. Lutfy's account?

A. We have a mail order business and it is not customary to keep a ledger account for cash mail order sales.

Q. This is the complete record?

A. This is the complete record.

(Government's Exhibit 18 marked for identification.)

(Testimony of Mrs. Margaret Larson.)

Mr. Parker: I might suggest to counsel I have a list of these and am perfectly willing to stipulate if the ledger sheets are offered in any manner.

Miss Reimann: We have no objection.

Mr. Parker: We have offered heretofore to stipulate that if the stipulation offered is not a correct statement the witness is here to correct it, if there is any error.

We offer to stipulate the following purchases by Dr. Lutfy from Westons Camera Supply Center, Santa Barbara, California—and Mrs. Larson, perhaps you can check me on this. “Item 21847, \$360.50.” And that merchandise was returned and a check given by your company back to Dr. Lutfy for the full amount of \$360.50.

The Witness: That is correct.

Mr. Parker: 11/25/47, \$93.90?

The Witness: Correct.

Mr. Parker: And 11/30/48, 165?

The Witness: That is correct. [73-A]

The Court: When you say 165, Mr. Parker——

Mr. Parker: \$165. Those items were correct?

The Witness: That is correct.

Miss Reimann: It is my understanding, Mr. Parker, in the stipulation is included the return of the one camera and check sent to Dr. Lutfy and the amount he paid for it?

Mr. Parker: Yes, ma'am.

Miss Reimann: That is included in the stipulation?

Mr. Parker: Yes, ma'am. That was returned

(Testimony of Mrs. Margaret Larson.)

and the check returned to Dr. Lutfy for that item. Now, I do not have in mind what the other purchases were. If you care to examine the witness while she is here regarding that matter.

Q. (By Miss Reimann): From looking at these slips you have here can you state what the item \$360.50 was for?

A. Yes. That was for a Leica camera.

Mr. Parker: That was the item returned?

The Witness: That is correct.

Q. (By Miss Reimann): And looking at the next amount of \$93.90 can you tell what that was for?

A. Yes. An Iconta thirty-five millimeter camera.

Miss Reimann: I forget the amount of the next stipulation.

Mr. Parker: The next one is November 30, 1948, the item is \$165.

The Witness: Yes. The item of \$165 was [74] also augmented by equipment which was sent to us for credit, a Medalist camera and a great many items were sent against that credit.

Q. (By Miss Reimann): What type items?

A. An Iconta thirty-five millimeter camera, a printer, a tray and print tongs, all photographic equipment.

Q. The whole bill of \$165 was covered by photographic equipment, is that correct?

A. Yes. [75]

* * *

ROBERT M. FOSTER

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Roylston: [78]

* * *

Mr. Parker: If it will expedite the matter, Mr. Roylston, we have offered to stipulate to these, the amounts and dates, as quick as I can locate them.

I have the dates and amount. The witness can check me. A purchase on June 11, 1946, \$60.02. On January 21, 1948, \$10.46. February 13, 1948, \$90.78. June 14, 1948, \$201.96. Is that correct?

The Witness: That is right.

Mr. Parker: We stipulate those purchases were made by the doctor on those dates from Dorris Heyman, in those amounts.

Mr. Roylston: Yes, sir. I so stipulate, your Honor.

The Court: Very well.

Q. (By Mr. Roylston): Now, referring to the purchase of \$90.78, can you tell from your records what that article was? A. Yes.

Q. What was it?

A. It was a French provincial extension table with three twelve-inch leaves.

Q. Can you tell from your records where that particular [79] French provincial table was delivered?

A. I had the directions—I don't know whether

(Testimony of Robert M. Foster.)

it was delivered there—it should have been delivered to 1305 East Granada Road. That was the shipping address. The statements were mailed to 301 West MacDowell, Phoenix. [80]

* * *

The Court: Let the record show the jury has withdrawn from the courtroom, the defendant present with his counsel and the United States Attorney is present.

This exhibit that was Government's 9 for identification which I took under consideration yesterday, the exhibit as now composed consists of a personnel card, apparently, that I can't see has any conceivable bearing on the case, a little [85] card with some notations in pen on it and a typewritten summary prepared by the witness who presented the exhibit, Mr. Beale. As far as to the objection as to relevancy is concerned, and I am addressing myself to the little card and the summary, that objection will be overruled. However, counsel has also objected on the ground of lack of authenticity, and with regard to the little card I don't think it has been sufficiently authenticated. The witness testified that it was in the handwriting of some people in the payroll office, that they had a practice of sometimes putting people on a payroll and not putting them on, he himself was on it sometimes and sometimes he wasn't. I take it the purpose of it is to show the compensation paid to Dr. Lutfy. I don't think there has been a sufficient authentication for

that purpose. With regard to the summary, a summary is proper wherever the records themselves are produced and the witness testifies that he has made the summary and the records from which he made it are available. In this particular situation, as I understand it, the witness has produced some of the records from which he made the summary, but it is my understanding all of the records from which he made the summary are not admissible. In the case of a public record we have a statute that permits the custodian of the record to certify that he has examined the records and they don't contain this or that. I know of no statute or rule that will permit a witness himself to make the summary, other than a [86] public officer, then producing part of the records from which he made it, have it offered. So for those reasons the objection on the ground of lack of authentication is sustained at this time. [87]

* * *

CLARENCE J. BEALE

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

By Mr. Royston:

Q. Mr. Beale, you testified yesterday afternoon?

A. Yes, sir.

Q. With respect to these two rolls of records would you state again just what period of time those records cover, those payroll records?

(Testimony of Clarence J. Beale.)

A. I don't know that I can call it by month but they [88] cover the entire period of time during which Dr. Lutfy was employed by the United Verde Extension Mine and for several months after he left. They cover entirely those months during which deductions were made from employees at the mine and the smelter, they are separate, during those months in which deductions were made in Dr. Lutfy's favor. I looked through for several months after the last month appearing there and I might say they represent, say, fifteen months. Now, if you multiply that by twenty-five years you would have some idea what I would have to pack down here if you are going to talk about a complete record running during the entire life of the United Verde Extension Mine. I couldn't see any point to it so I didn't do it.

Q. Are these the complete payroll record?

A. Absolutely. No sheet has been removed—I think there were one or two months during the beginning and end when there were no deductions but nevertheless they are in there. I took them out of this five or six hundred pounds of payrolls lying there in the corner of the vault and I with the help of another man, we simply opened them and we took out all the months, I would say maybe fifteen months or sixteen maybe, I don't know. It is on the recapitulation I made. There couldn't be a more complete payroll than that. They are all there.

Q. For the entire period involved?

(Testimony of Clarence J. Beale.)

A. For the entire period involved, yes. I looked through [89] there for several months after the doctor left. I kept looking through there until there were no more deductions so naturally I didn't bring them.

Q. With respect to Government's Exhibit 9 for identification, with respect to this card that is clipped to the typewritten papers, will you state again just where in the mining company's records that card was obtained?

A. It was enclosed with a bunch of property that thick, the same kind of cards, containing all the names of any salaried man that had been employed during those twenty-five years. They just kept it there for ready reference, I presume. That record, after I found that along with the other cards which I brought, they were handed back to me; I recognized them. The man that made that record, he is dead now, he was cashier and chief clerk at the main office where the checks were made up. I recognized it immediately because he and I contacted each other daily so I know his handwriting as well as I know my own. But to confirm that I took it to another man who had been a bookkeeper——

Mr. Parker: Just a moment.

Q. (By Mr. Roylston): Let me ask this next question. A. Go ahead.

Q. Did you of your own knowledge know where the file was in which the cards showing salaries of salaried employees were kept? [90]

A. You mean these cards?

(Testimony of Clarence J. Beale.)

Q. Didn't you state that the card was kept on each of the salaried employees?

A. That is right.

Q. They were kept in a particular file?

A. They were right there in my vault.

Q. You removed this card from that file?

A. I did, but I also have all the other cards, but they were handed back to me, they were up in a suitcase.

Q. This came from that file?

A. This came out of that bunch of cards.

Q. You state the person who made out that card is now dead?

A. That is right, a man named Smith, Stanley Smith.

Q. The cards kept in this file, was that the complete record to show the list of salaried employees and what they received?

A. Yes. As far as I know they were all there, my own and all the rest of the salaried men.

Mr. Royston: With the Court's permission I will remove this one card that was not connected with the other Exhibits. And I will reoffer Government's Exhibit 9 for identification into evidence.

Mr. Parker: Mr. Beale, I don't want to belabor this point too much, for the simple reason I don't think it matters [91] one way or the other.

The Court: I don't hear you, Mr. Parker.

Mr. Parker: I say I don't want to belabor this point too much because I don't think it is that important, but I would like to ask you this: I may

(Testimony of Clarence J. Beale.)

have misunderstood you, but I thought you said yesterday that these deductions represented only part of the payroll. I did not understand this was a complete——

A. If I may explain, that recapitulation there, if anyone checks it with those two payrolls will find that that is just taken off, right off those two payrolls right there and those are complete. There is nothing been removed. It is about sixteen full months.

Q. (By Mr. Parker): These two payrolls you refer to are the two rolls that are lying on the table here that have not been marked for identification, I believe. What two payrolls are those?

A. One is the mine and the other the smelter, kept in two different offices.

Q. Did that cover the entire payrolls of the United Verde Extension Mining Company?

A. Absolutely, the whole works, except this little handful of salaried men, probably six or seven that sometimes were kept separately and very often thrown on the main payroll. In the case of Dr. Lutfy, his name doesn't appear on those [92] payrolls. He and the other doctors and several others were kept privately. I don't know what became of that.

Q. You mean there was some other payroll that Dr. Lutfy and the other doctors probably appeared on?

A. That is right. They were given what was called a clean check, there were no deductions, prob-

(Testimony of Clarence J. Beale.)

ably just a short piece of paper marked the number of the check by which they were paid. The management didn't care to have their names on these big public payrolls, so to speak, lying open and everybody gaping at them, that is all.

Q. Do you know where this payroll on which the doctor's—do you know where that is?

A. I searched high and low. It has been mislaid, destroyed or something. I went to the former bookkeeper and he says, "I don't remember just what form," he says, "We kept a little sheet there to record the payment, the number of the check." It ought to be there—well, it isn't there, it is gone. But that other, that memorandum card—

Q. This card you have attached here in the handwriting of the gentleman whom you say is dead—

A. That is right.

Q. —it would appear to indicate a monthly, I suppose, basic salary? A. That is right.

Q. I am presuming? [93]

A. That is right.

Q. I assume these other amounts you found to be deducted from these payrolls was from each worker or some workers? A. That is right.

Q. Those amounts were paid to the doctors in addition to their basic monthly salary?

A. Certainly. It had nothing to do with the doctor's salary. He was given his check at the first of the month, of the preceding month. These are simply, some time along after the first when the payroll was closed the doctor was handed the check

(Testimony of Clarence J. Beale.)

for these various deductions and that is the record of it there.

Q. This card, of course, would not show, only apparently shows the salary that was fixed but it does not actually show anything about whether or not he got a full month's salary——

A. He certainly did.

Q. ——for a particular month. I mean if he was off it wouldn't show that?

A. I don't know if he was off, but in any event that was what he was paid month after month until his employment terminated.

Q. But isn't it true, Mr. Beale, you would have to have the payroll on which he appeared to ascertain that fact with certainty?

A. Probably technically so, but it is gone. I [94] can't produce it, that is all. There is just that memorandum is all I have.

Mr. Parker: If your Honor please, I am going to renew the objection previously made. I don't think the situation is essentially much better than it was before.

Mr. Royston: If it is on the basis of the fact this is only the stated monthly salary he received and that if he was absent he might not have gotten that much, any of that would be a matter for defense.

The Court: Let me understand something. Does that little card purport to show all of the monthly salary that was paid to Dr. Lutfy during the entire time he was there? I am talking of the salary.

(Testimony of Clarence J. Beale.)

The Witness: Absolutely. I can't imagine any deductions being made from the doctor's salary. He got a clean check.

The Court: May I see it, please? Was he paid a monthly salary?

The Witness: Yes, sir; he was paid a monthly salary.

The Court: What I can't understand is this has gaps of much as eight months in the dates.

A. I can explain that. For instance, he entered the employ of the United Verde Extension Mining Company on the 24th of September, 1934. For that month he was paid \$219 and he was paid at—well, that would be—however, whatever that [95] monthly rate was that was the proportion he was paid. Then on the first of February he was paid \$300 and that continued for February and March. On the first of April, 1935, he was raised to 350; that continued until he was off and the hospital was closed on the first of December, 1935, he was paid \$350. In other words, they didn't enumerate each month there. It just goes on, shows where his salary was paid. There are no gaps there at all. It shows where the only notation that would be made was when he was given a raise and the other, it continued on and on.

Q. Mr. Beale, there may not be any gaps, but until you explained it to me just now I wouldn't have——

A. I hadn't thought of that, your Honor, but I can say of my own knowledge I had almost daily

(Testimony of Clarence J. Beale.)

contact with the doctor and I don't recollect he was ever off and to me that is very plain. He started on a certain rate and within a month or two he was raised, then it continued for two months then it was raised to \$350 and continued until his employment was terminated.

Q. Going back to the rolls on the table there, I understand you now to say you have in those rolls the complete payroll of all the employees of United Verde? A. Absolutely.

Q. That is true regardless of whether or not a particular man had a deduction for Dr. Lutfy or not?

A. That is right. They are complete. I didn't take a [96] sheet or month out. They cover the entire period, whatever that little recapitulation shows, from the start to finish. Then several months later I went through the payroll—you see, there were deductions after the doctor left the employ. For instance, an employee signed up two months before the doctor left for \$50, well, they took \$5 every two weeks and after the doctor had terminated his employment and gone we kept taking that \$5 until a \$50 had been taken from that man's pay and paid to the doctor.

The Court: Do you have anything else?

Mr. Parker: Yes, I do.

Q. (By Mr. Parker): Is this all the money he drew from the company which you have already described?

(Testimony of Clarence J. Beale.)

A. That is all the money he ever drew. That is his salary and the deductions.

Q. You are quite positive about that?

A. Absolutely.

Q. Are you aware he received a \$25 a month allowance for his automobile, regardless of the use of it?

A. It could be. I am speaking about the money paid to him. Whatever he got under the table or around the side——

Q. This wasn't under the table, sir, it was on the table. A. Possibly so.

Q. Are you aware he was furnished a house to live in by the company and that was a part of his compensation? [97] A. It could be.

Q. It could be? A. That is right.

Q. I believe you answered the other day you were not aware of certain other compensation or salary he drew from other sources during that same time?

A. Yes. The other company, for instance, if the doctor had contracted with an employee of the United Verde Copper Company they would have extended the same courtesy to Dr. Lutfy as we did to their doctors, they would deduct it. He could have been getting a check from employees of the other company, that I don't know. I presume they have the records.

Q. But this record you have does not necessarily show fully or completely his earnings?

A. Absolutely not. I have no idea what the

(Testimony of Clarence J. Beale.)

doctor collected in cash and put in his pocket. I don't know anything about that, couldn't possibly know. It was none of my concern. I am just saying what he got in deductions and got in salary I know. What he got in the way of other favors, that I don't know. Possibly the doctor lived in the hospital. As a matter of fact, I think, so he would be subject to call; they naturally didn't charge him any rent, I guess.

Mr. Parker: If your Honor please, it still appears this doesn't shed much light because it isn't a complete record of his earnings for that [98] period.

The Court: It will be admitted for what it may be worth so far as it goes.

(Government's Exhibit 9 marked in evidence.)

Mr. Royston: No further questions.

Mr. Parker: No further questions. [99]

* * *

RAYE WAY

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Miss Reimann:

Q. State your name, please.

A. Raye Way.

Q. Where do you live, Mrs. Way?

A. Williams, Arizona.

Q. How long have you lived there?

(Testimony of Raye Way.)

A. Five years.

Q. What years, if any, did you live in Phoenix, Arizona? A. '45 to '49.

Q. During any of that time were you employed by Dr. Lutfy? [118] A. I was.

Q. When were you employed by him, if you recall? A. From 1947 to 1949.

Q. Do you remember any months on there?

A. I think it was, when I was employed it was after Labor Day, which was September. And I left in May, the end of May.

Q. That would be from approximately of September of '47 to May of '49, is that correct, approximately? A. Approximately.

Q. In what type of employment did you work for him, what did you do?

A. I was employed as a medical stenographer, receptionist and bookkeeper.

Q. Can you elaborate on that just a little, what your duties completely consisted of?

A. Taking all dictation, medical dictation and any other dictation that the doctor had to give me; keeping the bookkeeping, doing the bookkeeping, which was a daily log book, and acting as receptionist. When the patients came to the office they came to me first.

Q. You referred to this daily log book. Will you explain what type book it was and what you kept in that book, what you did yourself?

A. It was a doctor's daily log book. It was a yearly book. Each day was listed in the book, the

(Testimony of Raye Way.)

day and the month [119] throughout the entire year. When a patient came into the office they would come to me first as receptionist. I would enter their name on the log book on the day they came in and their medical record or chart would be pulled from the file and I would leave it on my desk until the doctor was ready to see that patient. The doctor took that patient and the patient's file into the office; when he was through with his services the chart was handed to me with the date the patient was in, the treatment rendered and the charge.

Q. Would the charges be in cash or sometimes were they billed?

A. They would be in cash; they would be charged; they would be checks.

Q. Did you enter every item of that in the daily log book?

A. Every item was entered in the log book.

Q. If it was charged, was it entered in the log book, too?

A. It was entered under "charge."

Q. If you got the cash would you enter that?

A. Under a cash call.

Q. How would you know it was a cash call or charge call?

A. If I saw the charge on the patient's chart that would be three or five dollars; they would stop at my desk and I would ask him if they were going to pay it or charge it. If they paid I made out a receipt and we had the receipts in duplicate. The

(Testimony of Raye Way.)

patient received the receipt and I had the [120] duplicate in the receipt book.

Q. You would say you kept a pretty complete record in that log book? A. Yes.

Q. How often would you check this log book?

A. It would be checked daily after the day's work.

Q. How was it checked?

A. I always had \$10 in my cash box to start the day for change. All the money was given to me and put in this cash box.

Q. When you say it was given to you, who gave it to you?

A. Patients; patients only. Or unless a check had to be cashed a patient would come into the office and wouldn't want to see the doctor but would want to pay their bill. Maybe a payroll check and I couldn't cash their check, I would go into the doctor's office and I would ask him if he could cash the check; he would cash the check and I would give the patient their change and they would pay their bill in full, then that check would go into the cash box.

Q. How was this checked by Dr. Lutfy? I believe you said he checked it at the end of each day?

A. At the end of each day Dr. Lutfy checked the daily log book, the cash, the charge and it was compared with the cash I had in my cash book.

Q. What would happen if you were off a [121] bit?

A. It was either the addition or sometimes I

(Testimony of Raye Way.)

may have put, when it was cash, I would put it in a charge or if I had been out to lunch and a receipt was made I didn't look at the receipt book and just wouldn't enter that name on the daily log.

Q. Would you fix this or get your books to balance every day before you went home?

A. Every day before we went home.

Q. You and Dr. Lutfy worked on that together at the end of each day? A. Yes.

Q. So that your records balanced as far as the cash you had in with what you had taken in?

A. Yes.

Q. Was Dr. Lutfy particular with you about this type of work?

A. Yes; he stressed accuracy all the time.

Q. The other work you did, say your typing, your dictating that you took from him, was he a particular man about that? A. Very.

Q. Would you explain that a little?

A. My letters had to be perfect. He hired me as a medical secretary and when he gave me medical dictation I had to be able to transcribe it properly. He did not like any erasures on his letters. They just had to be perfect. [122]

Q. Were you ever in Dr. Lutfy's home?

A. On several occasions.

Q. There for dinner?

A. Invited by his wife for dinner.

Q. Do you recall where he lived at the time you worked for him?

(Testimony of Raye Way.)

A. When I first worked for him I think it was Granada.

Q. Would you describe the appearance of the house, whether it was one house, whether several units put together?

A. You mean on Granada?

Q. Did Dr. Lutfy ever live any place else where you visited him? A. Yes; it was a triplex.

Q. Where was that, if you recall?

A. I think on Maryland.

Q. When you say a triplex, what do you mean by that?

A. Well, looked like a court, three.

Q. Did Dr. Lutfy, when you visited him, live in all of it, was it made together into one house, so to speak, for Dr. Lutfy and his family?

A. As far as I know. I was only in the dining room and living room.

Q. Did you ever see any other of the family there? A. No.

Q. Were the buildings connected, if you [123] know?

A. I can remember an archway into another room which may have been a second triplex, the second apartment.

Q. At any time, Mrs. Way, did you help Dr. Lutfy in compiling any figures for his income tax reports? A. Yes, I did.

Q. I want to show you this portion that I have taken out of Government's 8 in evidence and ask

(Testimony of Raye Way.)

you to look at this and see if you recognize any part of it?

A. I know that is the typewriter because there was an unusual print. And these are my figures on this page; these are my figures. These are my figures, this is not. This is not, this is not and this is not my writing. This is not my writing (indicating).

Q. But part of these figures on this particular group through here? A. Yes.

Q. You have put down there and you have set up these typewritten——

A. Yes. They were headings we made and these headings on these sheets were put on my X-ray table because it was the most convenient place.

Q. All right. If I may I would like to show the Jury the way this is put on.

Will you explain to the Court and Jury just what method you used in compiling these figures on here, where you did it, [124] what you did? I want you to remember it to the best of your ability, the way you did it and what the doctor did?

A. Before income tax the doctor instructed me to make out headings on different sheets of paper.

Q. Can you recall the different headings?

A. Some I can recall because I used some of these headings in this daily log. There is a sheet at the end of each month that has expenditures listed and there are titles. I can remember stationery, surgical supplies, lights, telephone.

Q. Automobile? A. Automobile.

(Testimony of Raye Way.)

Q. If these are yours maybe you can refresh your memory and read them off?

A. Office headings the doctor would give me, automobile upkeep, I could get that from the back of the book——

Q. Just a minute. When you say “from the back of the book”——

A. I don't mean from the back of the book. I mean every month there was a sheet in that daily log book that had all the expenses that were in headings that were made throughout the month.

Q. Was automobile expenses one of them?

A. I am not sure of that.

Q. All right. A. Office. [125]

Q. Go on.

A. Electricity, gas, water, entertainment, business taxes, X-ray supplies, stationery, and so forth. Laundry service, telephone and doctors' directory. Insurance, no. Collection fees, yes. Salaries and labor, yes. Drugs and supplies, yes.

Q. Now, this piece of paper would be blank and you would type all these headings at the top?

A. Yes.

Q. The ones Dr. Lutfy told you to type in?

A. Yes.

Q. Then what would you do with those?

A. I had all these papers on the X-ray table.

Q. These papers——

A. Those papers. Dr. Lutfy would sit at a table with a check book and daily log for that year. He would read the name and the amount and if I knew

(Testimony of Raye Way.)

the heading, like if it was for stamps or stationery, I knew which heading to put it under; if I didn't know it I would ask him which heading to put that particular amount under.

Q. When you say he would read the name, do you mean he would read the name the check was made out to?

A. The name the check was made out to and the amount.

Q. Say it happened to be a company you didn't know you would say, "Where do I put this," and he would tell you?

A. That is right. [126]

Q. There were quite a few of them you didn't know where they went, is that correct, that you would ask him about?

A. I would ask him about.

Q. Did you put any on here, in your recollection, that you weren't sure of, just a haphazard guess, you would put it on there without asking the doctor?

A. No.

Q. Did you total these up?

A. When we were all completed I take those to my office and add them on the adding machine, then for each sheet I clip on that adding machine tape for the total amount, then take them into the doctor and he would give it to his auditor with the log book.

Q. Did you have any more to do with the compiling of the records for his income tax returns?

A. That is all. The only other thing I did was for his social security and withholding for myself

(Testimony of Raye Way.)

and another employee and sending in the quarterly reports.

Q. But as far as the doctor's reports were concerned, the only thing you had to do with them was getting together and your putting the headings and figures down where he told you to put them, is that correct? A. Correct.

Q. Did you do any correspondence for the doctor in regards to guns or cameras? [127]

A. I took dictation on that.

Q. What type of stationery did you use, if you recall?

A. It was different than the regular stationery. I don't recall the exact name. It was Phoenix Photo.

Q. Did it have a letterhead on it?

A. A letterhead.

Q. Do you recall what the letterhead was?

A. I say I don't recall if it was "Phoenix Photo," I don't recall, but it was a letterhead.

Q. It wasn't the doctor's normal letterhead?

A. No. We had a box of stationery in the diathermy room and I only used it for that particular correspondence.

The Court: At this time we will take the regular afternoon recess for about ten minutes.

(Recess.)

Q. (By Miss Reimann): Your name is Raye Way, you were testifying before we took the recess? A. Yes, I was.

(Testimony of Raye Way.)

Q. I would like to show you Government's Exhibit 26 for identification and ask you if you have ever seen any stationery of that kind before?

A. I have not.

Q. You have never seen any like that?

A. No.

Q. Can you describe a little more fully the [128] type stationery you used when you wrote these letters you testified to in regard to the guns?

A. May I pick this up? I think it was in blue letters. I don't know if the name is correct or not; I think it had the Phoenix Photo Supply in blue letters and there wasn't, I don't think there was an office address, Phoenix, Arizona, but this wasn't on there and I don't know about this (indicating).

Q. Was Dr. Lutfy's name on it any place you can recall?

A. I can recall only when it was signed.

Q. I believe you stated it was a special piece of paper you used when you wrote letters in regard to what?

A. To guns and cameras. It was a letterhead.

Q. And did you write quite a few letters in regard to guns and cameras for the doctor?

A. Well, not too many.

Q. Do you know what type guns they were that were referred to in the letters? Do you know anything about guns?

A. Well, when I took the dictation I didn't know anything about guns or cameras so I had to ask how some of the words were spelled.

(Testimony of Raye Way.)

Q. These letters you wrote in regard to, say, the guns, do you recall any specific place you wrote these letters?

A. No, I don't, only we had the Rifleman Magazine in our reception room; there were ads there for guns for sale, and, you know, "I have this, what do you have," and the doctor would [129] answer an ad like that. He would make the ad up in long-hand.

Q. At any time did you write to the Rifleman Magazine and put in an ad for the doctor?

A. An ad was put in and the doctor would write it and I would type it and enclose it in an envelope and mail it.

Q. Would you describe the best you can remember the content of the ad the doctor would send to the Rifleman Magazine, was it for swapping or sale of the rifles, do you recall?

A. I don't recall.

Q. Do you recall whether there were any sales of cameras or not?

A. You mean in this Rifleman Magazine?

Q. Yes; any ads for the sale?

A. I don't remember any. I just remember the guns, gun or guns.

Q. You state you don't recall whether the doctor ever tried himself to sell one of his guns, you don't recall?

A. No.

Q. But you know you wrote up certain ads?

A. This one ad in particular. It was just this ad, and I don't remember of any other ad.

Q. What do you remember about that ad?

(Testimony of Raye Way.)

A. I don't know. I wasn't interested in that type work, I was just interested in getting the dictation and I did nothing else. [130]

Q. Did any checks ever come into you at the office for the payment of a gun?

A. I opened all the mail and if there was a check or any correspondence pertaining to a gun or a camera it was put on the doctor's desk. If there was a check it was put on his desk. That is all I had to do with it.

Q. There were some checks then that came in?

A. I don't remember; if there were, I just put them on his desk.

Q. At any time when you were in the office and while you were working there, did you see any of the doctor's patients pick up a gun there or did any of them pay you for a gun? A. Never.

Q. Did you ever see any guns in the office?

A. Never.

Miss Reimann: Your witness.

Cross-Examination

By Mr. Parker:

Q. Mrs. Way, I believe you stated you reside in Williams, Arizona? A. Yes, sir.

Q. And that you worked for Dr. Lutfy from 1947, some time in 1947 until April or May of 1949?

A. Yes, sir.

Q. And you are married, are you?

A. I am. [131]

(Testimony of Raye Way.)

Q. When were you married with reference to when you left Dr. Lutfy? A. July 3rd, 1949.

Q. Is it a fact that you left Dr. Lutfy's employ for the purpose of getting married?

A. Yes, sir.

Q. And moving to Williams? A. Yes, sir.

Q. Your husband's name is what?

A. Mr. Thomas E. Way.

Q. What is his occupation?

A. Justice of the Peace, Magistrate and ex officio Coroner.

Q. At Williams, Arizona?

A. At Williams, Arizona.

Q. How long has he been Justice of the Peace and Magistrate?

A. Thirteen years. And re-elected, I heard that today, five to one.

Q. Mrs. Way, at the time or the occasions when you visited in Dr. Lutfy's home at the invitation of Mrs. Lutfy, isn't it a fact his home was very plain and not at all luxurious or elaborate?

A. It wasn't pretentious. I was surprised.

Q. You were surprised? [132] A. Yes, sir.

Q. You were surprised to find he was living in very plain, very modest surroundings?

A. Yes, sir.

Q. That was true on both Granada and Maryland when he resided in the apartment there?

A. With that triplex there may have been room, but I was in a dining room and a living room; in my estimation, it wasn't elaborate, it was plain.

(Testimony of Raye Way.)

Q. Of course I believe I understood you to say that you did not know how much of this triplex was occupied by Dr. and Mrs. Lutfy because you were only in two rooms? A. I was only a guest.

Q. You made no investigation to see how much of the building they occupied? A. No, sir.

Q. You had no means of knowing whether the other two apartments were rented to tenants or not, there was just the children and Dr. and Mrs. Lutfy, that is all the persons you saw? A. Yes, sir.

Q. How many children did Dr. Lutfy have?

A. Three.

Q. Now, I believe you stated that there was one other employee there at the time you were working for Dr. Lutfy or [133] part of that time?

A. You mean in the office?

Q. Yes, ma'am. A. Yes; a technician.

Q. Is that what you would call a lab——

A. An X-ray and lab technician.

Q. Do you remember the name of that employee? A. Yes, I do.

Q. What was her name?

A. Harriett LeBeau.

Q. Was she there all the time you were there?

A. No. I had been there for a while before she was employed.

Q. You were there yourself about two and a half years, were you, or two years?

A. Not by myself.

Q. I don't mean by yourself, you were employed by Dr. Lutfy what, about two years, was it?

(Testimony of Raye Way.)

A. Yes.

Q. Did Harriett LeBeau have anything to do with the records or entries in the log book and so forth that you have described?

A. When I was out to lunch she stayed in the office and if any patient came in with money to pay on their bill she issued a receipt. When I went on my vacation she handled the [134] books, the log book and the cash when I was on my vacation.

Q. Now, Mrs. Way, in order that the Jury may have a somewhat more complete picture of this log book, did not each sheet have a number of columns, say, possibly three columns down the full length of the book in which to enter charges or money paid or that sort of thing?

A. That is right.

Q. Do you remember how those three columns were headed, what they were, how they were headed at the top of the sheet?

A. If I got a glance at it I could remember.

Q. We have them but we don't happen to have them here at this moment. I understood you to say that Dr. Lutfy was quite meticulous in the work that was done in the office?

A. Yes, sir.

Q. Meticulous in both keeping of his financial records and writing of letters and so forth?

A. Yes, sir.

Q. I will ask you if those three columns in that log book weren't entitled, one of them, "charge," the other, "cash," and the other, "received on account"?

A. Yes.

Q. Does that sound about right?

(Testimony of Raye Way.)

A. That is right.

Q. Had you had any particular experience in bookkeeping or the keeping of accounts? [135]

A. No, sir.

Q. You were, I believe you stated, a medical secretary? A. Yes, sir.

Q. Had you worked for any other doctor or doctors prior to the time you worked for Dr. Lutfy?

A. Yes, sir.

Q. What doctors had you worked for?

A. I worked for the Good Samaritan Hospital.

Q. How long did you work for the hospital?

A. Oh, about four or five months and they wanted me to take charge of dictation in surgery and I knew I wasn't that capable and there was a doctor in Phoenix needed a medical secretary so they sent me to this doctor to work for him, the Good Samaritan Hospital.

Q. What doctor was it?

A. Dr. Frank W. Edel.

Q. How long did you work for him?

A. One year.

Q. Did you do any bookkeeping?

A. He had his own receptionist, his own bookkeeper, his own nurses. I took nothing but medical dictation, went with him to the hospital to take all dictation on his patients and in the record room.

Q. Did you work for any other doctor prior to working for Dr. Lutfy? [136]

A. Yes; I worked at Grunow Clinic for Dr.

(Testimony of Raye Way.)

Hartgraves, who is in charge of X-ray and lab; did only X-ray dictation.

Q. How long did you work there?

A. A year.

Q. This was prior to working for Dr. Lutfy?

A. Yes, sir.

Q. Did you have to do any bookkeeping there?

A. No; it was just medical secretary. We had the two secretaries in Dr. Hartgraves' office that took nothing but X-ray and lab dictation.

Q. Was the work with Dr. Lutfy your first experience with bookkeeping? A. Yes, sir.

Q. During your period of employment?

A. Yes, sir.

Q. And had you ever had any training in accounting or bookkeeping? A. No, sir.

Q. And so you were green at it then when you went to work for Dr. Lutfy?

A. When I started to work for Dr. Lutfy he told me about keeping the books and asked me if I had kept books at any of the other doctors' offices; I said I had not. He said it was a simple form of bookkeeping, it would be easy to do. And he stressed accuracy because it is the same entries all the [137] time. You have to be accurate, otherwise you get careless making the entries.

Q. You say he did admonish you or caution you to be sure you kept an accurate set of entries on everything that went through the office?

A. Yes, sir; because it was simple but accuracy was important.

(Testimony of Raye Way.)

Q. That log book we have referred to, that was a doctor's log book, was it not? A. Yes, sir.

Q. Printed and set up especially for the use of doctors?

A. Yes, sir. I had seen that same book in other doctors' offices. I was familiar with the type book it was.

Q. It wasn't any double entry type bookkeeping, was it? A. No.

Q. There was nothing about it, I mean, any system of debits and credits you could balance at the end of the day or end of any particular period of time?

A. No. I just had this index filing system. I used to post things on that were charged or received on account and I used those index cards to make my monthly statements out and they were posted every day.

Q. Tell us about that. I don't believe you have described those before. In other words, the items that went on this daily log book were also entered on the—you had a card, did [138] you?

A. A card index.

Q. For each patient? A. Yes.

Q. And had the patient's name on this card, and did you make entries of the charges and of the payments and so forth on the patient's card as well as on the log book?

A. Correct. If it was a cash there was no necessity in doing that, but if it was charge or received

(Testimony of Raye Way.)

on account then it was posted on the day the charge was made, right onto this card, this index card.

Q. Did you do that, too, as time permitted during the course of the day, did you make the entries on the patient's index card also? A. Yes.

Q. To the best of your ability did you attempt to keep that patient index card as completely and accurately as you could?

A. I had to and if I didn't I got complaints when the bills were sent out.

Q. In other words, you sent the bills out from the patient's index card and if it wasn't accurate I imagine you heard from the patient promptly?

A. Yes, sir. Also on these cards I would put the treatment and the charge in case the patient did call up and wanted [139] to know why they were charged for certain things, why they were charged that much, I would be able to pull this card and be able to tell them the day they came in, the treatment rendered and amount charged.

Q. Were there ever any occasions where you inadvertently or in the hurry or press of work you ever slipped up and didn't get the entry in both places?

A. That was why I was pleased—I don't know that that is the word—but the books, that Dr. Lutfy checked the books daily, because there have been times when I have put a cash when it was cash under a charge or charge under a cash, see then the cash wouldn't balance so we would have to check the books again.

(Testimony of Raye Way.)

Q. I take it from your answer there were sometimes inadvertencies that were for the most part corrected?

A. Yes. When I got busy, get called in or a patient be waiting for a letter or the telephone be ringing, I would think I was entering it under the right column, but at the end of the day if it was a mistake it was noticed.

Q. Do you know who kept those records before you went to work for him, that is, in 1946 and that part of 1947 before you came to work for him?

A. There was this girl that was there before me and I think she was there maybe for a month and she was a technician at a lab downtown. I don't remember the lab's name, but she [140] was a technician. She was not a medical stenographer; and she would also show me how to make entries, you know, in the book and introduced me to the patients that came in.

Q. Do you remember her name?

A. Yes, sir.

Q. What was it? A. Esther.

Q. Do you know how to spell the last name?

A. Mesterick.

Q. Do you know whether or not she left Phoenix after you left there?

A. The last time I talked to her I understood she was going to school. I don't know where, to study to be a vet.

Q. You spoke of the fact your patients occasionally would come in to cash a check of one sort

(Testimony of Raye Way.)

and another; you mentioned payroll checks. Did you or did the doctor extend that accommodation to his patients of cashing checks for them?

A. If a patient came in with a pay check and didn't want to see the doctor, just wanted to pay his bill, I wouldn't have that kind of cash in my box and go into the doctor's office, show him the check and ask him if he could cash it and most of the time he would cash the check for me, give me the money and I would go out and whatever the bill was, the patient would pay his bill and I would give the patient his change and the check would go in my cash box. [141]

Q. Then how would that check—assume a hypothetical case, suppose the check was \$40 and the bill was \$10, how would that check be entered on the deposits slips when it went to the bank? Would it be entered in the name of the patient or the name of his employee who had given him the check?

A. It would be paid to the order of who the check was made out and that would be put on the deposit slip and the amount of the check.

Q. The full amount of the check?

A. The full amount of the check and what the patient paid would be put on the daily log book.

Q. Then, do I understand correctly—maybe I don't—I was under the impression that the check would be, such a check would be entered on the deposit slip opposite the name of the maker of the check. In other words, if the check was given by

(Testimony of Raye Way.)

Reynolds Metals Company it would say, "Reynolds Metals, \$40."

A. Yes. Then if I happened to make that out, like it would be Reynolds Metal right underneath in parentheses, maybe I would put the patient's name.

Q. Did you make a practice of making out deposit slips to go to the bank, or to what extent did you do that or who did make out the deposit slips most of the time?

A. I would sometimes, but Dr. Lutfy made out the deposit slips. I am sure of this, I would count that money and the [142] checks he would give to me I would total it on my adding machine and put the amount or money with the adding machine tape with the amount on it.

Q. Mrs. Way, is it not true it was a practice of Dr. Lutfy's and one which you also followed, of making out rather detailed deposit slips with the name of the maker of the check opposite each check, not merely the bank number, the name?

A. Right underneath it in small writing in parentheses the patient's name.

Q. And was it your practice to send deposits in each day or once a week, or how did you do that?

A. Well, the bank was down in town; Dr. Lutfy would take and whenever there was a sufficient amount to make a trip to town—I don't remember if it is once a week.

Q. Can you testify that the money which was

(Testimony of Raye Way.)

taken in there was regularly and systematically banked, the checks that came in?

A. The checks that came in, you mean?

Q. Yes. A. To me?

Q. To the best of your knowledge.

A. To the best of my knowledge they were, as well as the cash.

Q. Yes. I believe you also testified when people paid cash they received a receipt of which a duplicate was kept? [143]

A. Yes; we had the duplicate receipt book.

Q. Now, Mrs. Way, you were describing awhile ago the method by which you and Dr. Lutfy prepared the data to be sent to the Business Service Bureau—I think you just referred to the accountants—for the preparation of income tax returns. You stated it was done in the X-ray room, as I recall it? A. Yes.

Q. Was there any particular purpose in doing that work in the X-ray room?

A. Yes; your table, your X-ray table is a nice size and you could just put down each sheet in a row across this X-ray table.

Q. That is these sheets that were added as you have previously described?

A. Yes; put them in a row.

Q. Automobile expense, and so forth?

A. In alphabetic, put the headings down in a row.

Q. Was there any other reason for going to the X-ray room besides the large table?

(Testimony of Raye Way.)

A. Yes, sir.

Q. What was that?

A. With the X-ray room it was toward the back and we had intercommunication and the technician would sit at the desk as we were doing that work and any patient that came in the [144] office or the doctor was wanted on the 'phone she would buzz us in the room and say, "Mr. or Mrs. so and so is in to see you." We would leave the sheets in there so they wouldn't be disturbed, he would take care of the patient and if there was any receipt I had to issue I would take care of that. When there weren't any patients in the office we would go back again to the X-ray room.

Q. That was in part to keep from being disturbed by the coming and going of the patients?

A. Yes, sir. They weren't disturbed in there unless there was an X-ray to be taken.

Q. I take it from your period of employment you probably assisted the doctor in the preparation of his income tax data for 1947, which would have been done in the Spring of 1948, and also for the year 1948 which would have been done in the Spring, 1949, you helped him in two of those years involved in this case?

A. Yes.

Q. Now, will you describe in a little further detail exactly how the tabulations were made on these sheets which you had spread out on this X-ray table. I want to have a little better picture of just how you worked, who did what, and so forth?

(Testimony of Raye Way.)

A. I sat at the X-ray table and the doctor sat at his desk in the X-ray room and he read the name and the amount of [145] a check; if it was familiar to me, I mean, what heading I should put it under, like "telephone account," Mountain States Telephone, I would call which heading it would go under and he would read off the name and the amount of the check and then also he would use the daily log book for the expenses that were listed.

Q. You are referring to cash expenses when you say he used the daily log book, that was cash outlay that might be paid out?

A. Yes. Like he might pay a yardman, take it out of my cash box; as soon as I gave him the money I would enter it in that expense sheet in the daily log.

Q. What did Dr. Lutfy ordinarily read from in reading off these checks, did he read from the stubs of checks made out of the regular check book?

A. Stubs—well, his back would be turned, you know, and I know he had a check book on that table and a daily log and he would read, he would read the amounts off.

Q. The payee of the check and amount?

A. Yes, sir.

Q. Do you remember if he read from the cancelled check itself or stub, or both, or what was his practice?

A. Well, all I know is the stub. I couldn't say.

Q. How about counter checks though, a check might be written and I assume there might be some

(Testimony of Raye Way.)

when Dr. Lutfy would [146] be out of the office, might write a check, I refer to those as counter checks, meaning only it would not be a check that came out of his regular check book. There wouldn't be any stub for that. Do you recollect he read from the cancelled check itself?

A. I don't know. All I know I was intent on those headings and putting the figures down.

Q. You were intent on getting them down as accurately as possible? A. Yes, sir.

Q. And you would, as you say, in some cases where you knew or felt you knew where the item belonged, in which of the expense columns it belonged, you would put it there? A. Yes, sir.

Q. And other cases you might have to ask Dr. Lutfy which column to put it in? A. Yes, sir.

Q. An item like, for instance, "Coulter," what would that mean to you?

A. The name is familiar, Coulter automobile, would be automobile repair.

Q. And you would probably put that down without asking? A. Yes.

Q. In the automobile expense?

A. Yes, sir. [147]

Q. I assume the extent of the accuracy would depend in part upon your correctly understanding or hearing him as he read off the items?

A. Yes, sir.

Q. You did not yourself during the compilation of these items, you did not yourself examine the checks? A. No, sir.

(Testimony of Raye Way.)

Q. You simply depended on your hearing?

A. That is right.

Q. His reading them off?

A. That is right.

Q. And hearing them accurately?

A. Yes, sir.

Q. And being able to put them in the proper column?

A. Yes, sir.

Q. And you did that as accurately and to the best of your ability?

A. Yes, sir.

Q. And then you explained that when the column was completed, I mean when it had been gone through, then you ran them up on an adding machine and attached the tape to the particular sheet?

A. Yes, sir.

Q. And then what was done with those sheets?

A. They were given to Dr. Lutfy. I took them into his [148] office and put them on his desk.

Q. And was a sheet set up or figure arrived at for his income, his gross income for the year?

A. When I was finished with that that is all I was interested in.

Q. That is all the part you had to do with it?

A. Yes, sir.

Q. And he supplied the accountants?

A. Yes, sir.

Q. Mrs. Way, is it not a fact Dr. Lutfy prepared a statement of his income, his gross income, by referring to this daily log, and that he listed that for the accountants month by month from the log?

A. At the end of each month—at the end of each

(Testimony of Raye Way.)

day that the cash, the received on account, the columns, those three columns were totalled up and the totals were put at the end of each day. Then at the end of each month——

Q. It was brought forward, the accumulated totals were brought forward?

A. Yes, sir; month after month throughout the entire year.

Q. You did that? A. I did that.

Q. You did that with the same degree of care and accuracy to get it correct and proper amount of his total income there, [149] you did that with the same degree of accuracy? A. I did that.

Q. Is it not true that Dr. Lutfy during part or some of the time you were there had some rental incomes that came in?

A. There was a folder and it was marked, "rentals." It was my task to draw—and I can remember well—there was a doctor had office space in our office until he moved to the office next door. That was a rental. There was a musician in the back——

Q. That was Mr. Montegeaux Matchel?

A. Montegeaux Matchel.

Q. That was 307?

A. That was at the back of our office.

Q. A little house? A. A little house.

Q. In the rear and somewhat west of the office building?

A. Yes. Most of the time that place was rented and it rented, it was used as a dancing school, that

(Testimony of Raye Way.)

is how I remember, for just a short time as a rental.

Q. I am not quite clear how you handled these rent checks that came in from the rentals you described. You say you put those in the folder?

A. You mean the checks?

Q. Yes.

A. The checks were just put in my drawer; then when we [150] counted up our cash during the day, didn't count those rentals in it. Dr. Lutfy took those checks.

Q. They were not deposited along with the office receipts? A. I didn't bother with those.

Q. You didn't have anything to do with those?

A. No.

Q. Just for patients. Mrs. Way, you know, as a matter of fact, the rent checks were deposited in the bank but weren't entered on the daily log because they were not professional income?

A. That is right. I did not enter them in any book.

Q. Now, Mrs. Way, I would like to ask you whether or not Dr. Lutfy ever at any time suggested that you omit any item of income or business, professional income there from the records or ever instruct you to resort to any deceptive device of any kind? A. No, sir.

Q. And did he ever at any time insinuate or suggest such a thing? A. No, sir.

Q. And during the entire period of your employment there was your instruction from him the

(Testimony of Raye Way.)

same, that is, you keep complete and accurate records there of the business in that office?

A. Yes, sir. If I wouldn't have I would have been [151] discharged the first month. It was really a probationary period.

Mr. Parker: That is all.

Redirect Examination

By Miss Reimann:

Q. You said you visited Dr. Lutfy's home on Maryland Street. Have you visited at his home where he lives now?

A. I had when I was in Phoenix with my little boy, I called up Mrs. Lutfy and went to his home.

Q. When was that?

A. In December, before Christmas.

Q. This year? A. That is 1953.

Q. Was it different—

Mr. Parker: I beg your pardon. I didn't mean to interrupt the lady. This is all obviously irrelevant and it would be prejudicial and could serve only that purpose, because his present home was built since his wife came into her inheritance and is built on borrowed money and a few other things, but it is far after this period with which we are concerned here.

The Court: The objection is sustained.

Q. (By Miss Reimann): Returning back to our X-ray table and room where we compiled all these figures, when Dr. Lutfy read off these amounts to

(Testimony of Raye Way.)

you you stated he did it from out of his check book, is that right? [152]

A. From the check book and I surmised it would be the stubs.

Q. At any time when he was reading off these figures did you have the check book in your possession or check the figures in any way?

A. No; I was busy with the headings. I sat at the desk on the other side.

Q. You copied off any figure he read to you, is that correct?

A. That is right; under the proper heading.

Q. And if you didn't know what heading it went under, he told you where it went?

A. That is right.

Q. And you put it there? A. Yes.

Q. And you are not hard of hearing, are you, Mrs. Way?

A. I don't think so, when I am not disturbed.

(Government's Exhibit 27 marked for identification.)

Q. (By Miss Reimann): I would like to show you Government's Exhibit 27 for identification and ask you if you can recognize that, if you had anything to do with it, and ask you if you recognize the writing on the bottom of it as to who wrote it?

A. This is Dr. Lutfy's writing.

Q. Have you seen his writing many times? [153]

A. He had to sign everything, all my work.

Q. And you feel from your observing his writing

(Testimony of Raye Way.)

the times that you have you can definitely identify that as his writing?

A. I am not too sure of this, but right here, this depreciation, I can definitely say that is his writing.

Q. On this page did you do any of this typing here? A. Well, it is the same typewriter.

Q. Do you recall doing that particular part or is it too long ago?

A. 1947, the only thing I can say, if it is 1947 I worked there so it must have been my typing. That is the only way I can tell.

Miss Reimann: No further questions.

Recross-Examination

By Mr. Parker:

Q. Do you remember what time in 1947, what period of the year you went to work for Dr. Lutfy?

A. In 1947?

Q. Yes.

A. I think it was after Labor Day, the first day after Labor Day, because I remember it was a holiday and I couldn't report to work at that time.

Q. Then it would not have been the first, it was after the first Monday in September, 1947?

A. Yes, sir.

Q. That you went to work for him for the first time? [154] A. Yes, sir.

Q. You had not prior to that time worked for him at all? A. No, sir.

Mr. Parker: That is all. [155]

EDWARD J. BAMRICK

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Roylston: [160]

* * *

Mr. Roylston: I will reoffer Government's 32 for identification.

Mr. Parker: I should like to urge the objection which I have in mind, your Honor.

The Court: Members of the jury, counsel has some legal matter that wants to be presented and passed upon at this time that can properly be done only in the absence of the jury. At this time I will have to ask you to retire, and remain outside of the courtroom until you are called back.

(Whereupon the jury retired from the courtroom.)

The Court: The record may show that the jury is entirely withdrawn from the courtroom, and the defendant is present, and the defendant's attorney and the United States attorney are present.

Mr. Parker: If your Honor please, I direct the Court's attention to the last page of the exhibit. This is a loan application. It appears clearly when you contrast the values [162] which are set up, that they are referring to present market values rather than values based upon costs. These same items of real estate are described in the longest of the two

stipulations which have been introduced here, and the cost of the real estate.

Now, I have in mind in this connection that many business men, farmers and others will, for instance, carry a piece of land or other item of property on their books at a book value representing roughly their cost. They may have bought the land sometime ago. They may be carrying it at \$100 an acre whereas it may bring on today's market 300 or 400. It is quite obvious that this exhibit—and we have not yet gone into the manner in which it was prepared—predicts certain values upon an estimate of present market value, and that that is not the basis that is proper here. It does not correspond with and is in conflict with the stipulations which have been entered into.

It is a matter of common knowledge that almost everyone in making an application for a loan is likely to use whichever method of arriving at the valuation of his property that will result in the largest type of result.

It seems to me that this exhibit would be prejudicial; that is in direct conflict with factual material here which we have stipulated to. If your Honor will notice this exhibit 29, we go through all these real estate transactions, and we [163] have them typed right down to actual costs, and where the property was sold in the particular year, we have it tied down to the actual sale value. It was my understanding all the way along that that was the method the Government adopted. For want of any other

alternative, we have, of course, adopted the same basis for computing values.

This exhibit obviously, in my opinion, is put in for the purpose of prejudicing the defendant and obviously also a situation where an entirely different method of values was used.

We can take the farmer or business man, for instance. He is carrying his property for \$100 an acre. That is what he has in it. He can carry it at that but if he went to the bank to make a crop loan he would probably put it at \$300 or \$400 an acre, whatever it was worth at that time; but that does not render his book value wrong, is illegal or anything of that sort. He is not called to account for that present market value until he sells that property. Then he is called to account for that present market value.

Mr. Royston: I might save some time if I can interrupt counsel. I suppose I should have made it a little clearer as to what the purpose was in offering that. It was the statement signed by the Doctor what purports to be the net income from the Doctor's practice and the net rental income. I think Mr. Parker is right on the real estate part. [164]

Mr. Parker: I think it is not only the last page. I think the last page is a breakdown of other figures. I miscomprehended counsel's purpose in offering it. I would say for impeachment it might be proper. I don't believe it is proper at this time. I mean, the Doctor wasn't making any income tax return. He didn't have to make a return of his income to the

life insurance company to whom he was applying for a loan. The figures I notice are modest.

The Court: I suggest you look at it exclusive of the last page and see if you have objection to that.

Mr. Royston: Actually, we would be willing to take off that first page. I don't think it has any bearing, and the only page we are interested in is the page that purports to be Dr. Lutfy's signature.

Mr. Parker: On that, if the thing you are interested in is only his statement of income, and we get away from these possibly entirely different basis of evaluations, I think we should have to eliminate the top half of that page.

Mr. Royston: That is right. The part listed "assets," we could either cover that or agree that the jury won't be read anything.

The Court: I think you should cut it off.

Mr. Parker: That would go a good way—I mean there would be less prejudice in the exhibit if that could be cut off or covered or something. [165]

The Court: May I see it, please?

(Counsel approach the bench. Discussion out of the hearing of the reporter.)

The Court: Do you have objection to Exhibit 36 as it is now constituted?

Mr. Parker: The objection that I have is that I expect to show that this was done very casually; that it was typed by Mr. Bamrick; that Dr. Lutfy had no records; that it was an obvious guess.

The Court: It is still a matter of cross-examination.

Mr. Parker: Yes, it is a matter of cross-examination.

Mr. Roylston: I will recall Mr. Bamrick to the stand.

Mr. Parker: My objection actually goes only to the weight rather than to the admissibility and is predicated on circumstances surrounding the making of this document or exhibit.

The Court: When the jury comes in, I propose to admit Exhibit 32 as now constituted. Mr. Bamrick, will you resume the stand?

(Whereupon, the jury returned to open Court.)

EDWARD J. BAMRICK

previously called and sworn, resumed the stand.

The Court: Government's Exhibit 32 for identification will be admitted as Government's 32 in evidence.

Direct Examination
(Continued)

By Mr. Roylston: [166]

Q. If I might at this time read Government's 32 to the jury.

(Government's No. 32 was read to the jury.)

Mr. Roylston: —“number of persons wholly dependent upon me”—I won't read the rest.

Cross-Examination

By Mr. Parker:

Q. Mr. Bamrick, during what period of time were you employed by Bert Cavanagh Realty?

(Testimony of Edward J. Bamrick.)

A. From December, 1945, until December 31, 1951.

Q. During that period of approximately six years, what capacity did you occupy with them?

A. I was manager of the mortgage loan department of that office.

Q. They maintained that as a service to their clients, a mortgage loan department?

A. Well, if you wish to call it that. If I might elaborate, it was not only a service to their particular clients from a brokerage standpoint, it was a mortgage loan business, more or less separate and apart from the other operation of the office.

Q. Were you employed in that capacity during the entire time you were with Cavanagh Realty Company?

A. All, excepting from about December 8, 1945, until approximately the 15th of May, 1946. [167]

Q. As I understand it, the Cavanagh Realty Company did not loan money on mortgages, but simply processed loans where the money was being loaned by banks or insurance companies and the like; was that the method?

A. That is correct. In this particular case, they were the designated correspondents for Northwestern Mutual Life Insurance Company on any loans that were submitted to Northwestern Mutual Life.

Q. In that capacity as manager of the mortgage loan department, one of the functions which you regularly performed was assisting applicants for

(Testimony of Edward J. Bamrick.)

mortgage loans in filling out applications for such loans, was that not true?

A. Yes. You have to assist them in some method.

Q. In this particular case, I am referring to this Exhibit No. 32. Do you remember typing that yourself?

A. I couldn't remember that. That was six years ago and much has happened to me since then.

Q. You do not remember whether you personally typed it or not?

A. In all probability I did because I handled most of the particular work myself. It was primarily, let us say, a one-man operation.

Q. Do you recall that at the time you filled this out for Dr. Lutfy, these figures respecting income were arrived at rather casually or loosely, were they not? [168]

A. That I would not know, counsel, because they would necessarily have to have them furnished by the Doctor. I wouldn't have no way of knowing.

Q. He had no records of anything of that sort with him that you remember?

A. I wouldn't recall, no, sir.

Q. You don't remember?

A. No, sir, I don't remember.

Q. Do you remember that he told you at the time that it was just a guess, that his practice—this was in May, 1948—that his practice was increasing and that this was just a guess?

A. He may have done so, I could not recollect.

Q. Do I understand correctly, Mr. Bamrick, that

(Testimony of Edward J. Bamrick.)

due to the fact that this was some years ago, and that you have handled quite a number of these applications for loans, that you don't have any independent recollection at this time of the interview at the time this loan application was prepared by you?

A. No, I could not have a clear recollection, counsel. When I departed from Cavanagh Realty in Phoenix, all the files in those particular cases, and all the cases I handled, remained there, including all rough notes and memoranda.

Q. You have no access to those files?

A. Oh, no.

Q. Based on your experience here in handling those applications for mortgage loans, did you observe any disposition [169] on the part of applicants at times to exaggerate their incomes a little bit to make sure they were going to get the loan?

A. That could have been done but they certainly wouldn't reflect that to me because they knew I was representing Northwestern Mutual and also represented other insurance companies.

Q. Mr. Bamrick, in handling these applications, you didn't put the applicants under oath, you just simply took their word for what their income would be?

A. He or she, that is the case.

Q. You had no way of knowing what a particular applicant had in mind, whether he had in mind the future or the present moment, or whether it was estimated, anticipated income during the period of

(Testimony of Edward J. Bamrick.)

the loan, or just what he had in mind; you had no way of knowing that?

A. I would have no way, no, sir.

Q. You didn't require the applicant to produce any documentary proof to show by any documentary evidence what his income was; you simply took his word for it?

A. If a client is a reputable person and sufficiently so, I would submit an application for a loan to my company that that man is a substantial person as far as I am concerned.

Q. And he is giving you a reasonably accurate approximation of his income? A. Yes, sir.

Q. That is all you require? [170]

A. Yes. You put a person under oath and he would walk out. You wouldn't have any business.

Q. A reasonable accurate approximation is all you were interested in? A. Yes.

Mr. Parker: That is all.

Redirect Examination

By Mr. Royston:

Q. Did you send this application on to the Northwestern Company, Mr. Bamrick?

A. Oh, yes. I sent it to the Los Angeles office, which is the procedure. The Los Angeles office apparently reviews the whole file and submits it to the Board of Northwestern Mutual Life in Milwaukee.

Q. At the time you forwarded the application,

(Testimony of Edward J. Bamrick.)

did you have to either recommend for or against the Company making the loan?

A. We recommend or consider a standard for a loan as reflected in the application.

Q. You so recommended in this particular application?

A. A loan of \$15,000 based on that property as collateral for the loan should be considered by the Board.

Q. When you made that recommendation, was one of the things you relied on the honesty of the statement contained in the document? [171]

Mr. Parker: There is no charge of anything fraudulent. The Insurance Company is not complaining about the loan. I don't think this is a proper line of inquiry.

Mr. Royston: This is what Mr. Parker brought out concerning whether the person was under oath and what the statement consisted of. I am going a little further into it.

Mr. Parker: I don't think there is any issue whether the Insurance Company relied on any statements on income or collateral. The witness just indicated the collateral was pretty good.

Mr. Royston: Let me withdraw that question.

Q. (By Mr. Royston): When you forwarded this application on with your recommendation, did you know that the statement that Dr. Lutfy signed, he understood the statement, "I represent that the following is a true and correct itemized statement of my assets and all my liabilities and also my present

(Testimony of Edward J. Bamrick.)

income and expenses"; did you know the document contained that statement?

A. Why, sure. [172]

* * *

Mr. Roylston: At this time, if it pleases the Court, I guess I might as well read some of these stipulations to the jury. These have to be read sometime so we might as well do it now.

Mr. Parker: Are these to be read in the order in which they are marked?

Mr. Roylston: I will read 29 first. I am not reading from Government's Exhibit No. 29.

(Government's Exhibit No. 29 was read to the jury.)

Mr. Parker: I think there is purely one clerical error in stipulation No. 5. Where it is 7-19-46, \$244, that should be 47. It should be 7-19-47, \$244.

Mr. Roylston: That is right. I think that is correct. It will be corrected by interlineation.

Mr. Parker: The 6 should be off.

The Court: Is there a stipulation correcting it?

Mr. Parker: Yes.

Mr. Roylston: Yes. If I might proceed now to read Government's Exhibit No. 30 which is another stipulation.

(Government's Exhibit No. 30 was read to the jury, and during the reading of the exhibit the following took place):

Mr. Parker: Just a moment. I beg your pardon to interrupt, but your office drafted this stipulation, and it was not my intent to do more than stipulate to the payments, [173] not to any legal conclusion as to whether these were personal or not. Those were all agreed in No. 29. I don't know if you misunderstood me or if the stenographer just followed the other form of the introductory paragraph. I notice now for the first time it refers to this as personal. We admit the expenditures and want the stipulation to so show, but there are some of these that may or may not be deductible as business or professional expenses. It was not our purpose to stipulate as to a legal conclusion about these. In the other stipulation, it was our purpose to stipulate those were personal expenses, but not on this one, and I had not observed at the time it was handed to me across the table. I rather hurriedly signed it without reading carefully this introductory paragraph.

Mr. Royston: Then I misunderstood the stipulation because I thought we were making the same stipulation to these expenditures as to the other expenditures.

Mr. Parker: No. We were stipulating these expenditures were made, but I cannot stipulate, and I would be going contrary to the fact that they were all personal and had no business or professional.

The Court: We will take our morning recess at this time.

(Recess.)

Mr. Parker: If your Honor please, in this matter I think we are in agreement.

Mr. Roylston: Before we begin that, Mr. Parker indicated [174] he no longer needs these two witnesses. May they be excused?

The Court: Mr. Bamrick and Mr. Westring, you may be excused.

Mr. Parker: In this stipulation, if we could strike from the opening paragraph the words following "Louis P. Lutfy."

The Court: That would be beginning in the middle of line 17?

Mr. Parker: Yes, your Honor. To the end "conducted by him." Further, in connection with that matter, I suggested to Mr. Roylston as to the third item on the second page, we will stipulate that item as a personal expense not connected with his business or profession.

Mr. Roylston: I will so stipulate, your Honor.

The Court: Very well.

Mr. Roylston: I am now going to read Government's Exhibit No. 30, which is a stipulation. It has the same heading as the one I read before.

(Government's Exhibit 30 read to the jury.)

Mr. Parker: I didn't previously see the expression, "for household purposes."

Mr. Roylston: I will stipulate that can be taken out. I will start with No. 1 again.

(Reading to the jury.)

Mr. Roylston: There is one other stipulation and it is [175] marked Government's Exhibit 31. It has

the same heading as the other two, and it reads as follows.

(Government's Exhibit 31 read to the jury.)

Mr. Parker: Mr. Royston, will you pardon the interruption. In No. 47, there is a typing error. It should be 301 West McDowell Road, instead of 305 West McDowell Road.

Mr. Royston: May that be corrected by interlineation?

Mr. Parker: In 46, it was correctly stated as 301, but in 47, referring to the architect, it refers to 305, and it should be 301.

(Continued reading of Government's Exhibit 31.)

Mr. Royston: That completes the stipulations, your Honor.

The Court: Very well. [176]

* * *

HOWARD H. WHITSETT

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Royston:

Q. Will you state your name?

A. Howard H. Whitsett.

Q. What is your occupation, Mr. Whitsett?

A. I am an Internal Revenue Agent for the Treasury Department.

(Testimony of Howard H. Whitsett.)

Q. Will you speak a little louder, please?

A. I am an Internal Revenue Agent for the Treasury Department.

Q. How long have you been with the Internal Revenue Bureau?

A. A little over seventeen years.

Q. What type of work do you do with the Internal Revenue Bureau?

A. We audit income tax returns.

Q. Speak a little louder, please.

A. I audit income tax returns.

Q. In connection with your work in the Internal Revenue Bureau in auditing income tax returns, did you have occasion to ever check or audit the income tax return of Dr. Louis P. Lutfy?

A. Yes, I did.

Q. When was this matter of Dr. Lutfy's income tax return first [177] referred to you?

A. Sometime in the early spring of 1949.

Q. What particular tax return was referred to you?

A. The 1947 return of the Doctor and his wife.

Q. I will show you Government's Exhibit 3 and ask you if that is the return which was first referred to you for an audit or for further investigation?

A. Yes, sir, it is.

Q. When you first received that, what was the purpose of that return being referred to you?

A. Well, someone in the Agent's office that goes over these returns as they are filed and picks out the returns to be assigned to the various agents for

(Testimony of Howard H. Whitsett.)

auditing if there appears to be anything on the return that needs checking.

Q. It was assigned to you for further auditing, is that correct? A. That is right.

Q. When that return was first assigned to you, what, if anything, did you do?

A. I went over the return myself to see just what items were on the return and what items might be questionable.

Q. When you checked the return, did you find anything which led you to a further investigation?

A. Yes. I——

Mr. Parker: I think the question is [178] answered.

The Court: It has been answered.

Q. What was there on the return that led you to conduct a further investigation?

Mr. Parker: If your Honor please, I think this is going into what would amount to an opinion by the witness about the return. I am certainly not objecting to anything he did or what investigation he made or what he learned, any fact of that nature.

The Court: I think what he did is what is material here.

Q. Before we go any further into what you did in this particular case, you stated you have been with the Internal Revenue for approximately seventeen years, is that correct? A. Yes, sir.

Q. Have you ever previously testified in any Federal cases as an expert witness? A. Yes, sir.

Q. After you received this return, this 1947 re-

(Testimony of Howard H. Whitsett.)

turn, for further audit, what did you first do after you examined the return; what was the next thing you did?

A. I contacted the Doctor, contacted Dr. Lutfy and made an appointment with him to go over his books and records.

Q. When did you first talk to Dr. Lutfy concerning this 1947 return.

A. I made an appointment for April 20, 1949.

Q. Did you talk with Dr. Lutfy on April [179] 20th? A. Yes, sir.

Q. Where was that meeting between the two of you? A. In the Doctor's office at 301—

Q. When you met with the Doctor, was anybody present, other than you and Doctor Lutfy?

A. Not while we were discussing the returns and his books.

Q. Approximately what time of day was that, morning, afternoon or evening?

A. It was morning.

Q. On the morning of April 20th, and what year was that? A. '49.

Q. 1949. When you first contacted Dr. Lutfy in his office, relate to the best of your recollection what the conversation was between you and Dr. Lutfy at that time?

A. I asked him for the books and records he used to compile the figures for the return. He gave me the log book and some sheets of papers that he compiled his expenses off of; and the first thing we

(Testimony of Howard H. Whitsett.)

do on an audit is check those figures against the figures used in making the returns.

Q. Did you check the figures that Dr. Lutfy gave you at this first meeting against this 1947 return? A. Yes.

Q. What were the specific items you checked there in the Doctor's presence, if you remember?

A. He gave me the books, and went on about his practice, [180] and I checked the receipt from his business from the log book. I went over the expense items that were in the log book and checked the entries of the expenses against the expenses listed for his business, but then I didn't go over the checks because there was nothing but just figures, there was no way of identifying the various items to make up the expenses.

Q. There, on the morning of April 20, 1949, did you have any further conversation with Dr. Lutfy?

A. Yes. I looked over his depreciation schedule and saw there was a considerable amount of property listed as depreciable assets.

Q. Did you discuss those with Dr. Lutfy?

A. Yes. I discussed them with the Doctor. I asked him for verification of the costs of these items.

Q. Did Dr. Lutfy furnish you with any verification for any of the items listed there on the '47 return?

A. Yes. I asked him about the office building listed here, that he has the cost of \$30,000, and he gave me a folder.

Q. That cost of \$30,000, you got that from that

(Testimony of Howard H. Whitsett.)

'47 return? A. That is right.

Q. The Doctor gave you a folder?

A. He gave me a folder of the contracts he had let to contractors for all the expenses with the dates of payments and so forth, going to make up the cost of this. I added this all up and it only amounted to around \$20,000, a little over [181] \$21,000.

Q. Did you call that to Dr. Lutfy's attention at that time? A. Yes, I did, and I asked him——

Q. Go ahead and relate that conversation.

A. I asked him where the rest of the costs were that went to make up this \$30,000. He said that after the office building was built he had some changes and additions to things and took me around the office and showed me a new drinking fountain, he had to have a metal door put in the X-ray room and a special type of plate for his X-ray room; a few small items but didn't, to my mind, add up to \$9,000.

Mr. Parker: I move to strike the last statement of the witness.

The Court: It may be stricken, that part of the answer, "didn't, to my mind, add up——"

Q. After he showed you this drinking fountain and the metal door, did you discuss any further costs of the building as it was listed on his '47 return for depreciation purposes?

A. Yes. I asked him if he had any idea when he let the contract for around \$21,000, if it would cost him another 50% of that to complete it so it would

(Testimony of Howard H. Whitsett.)

be the way he wanted it. He said, "No," he had no such idea in mind at that time.

Q. Did you ask him anything in regard to the land on which the building was located?

A. I asked him if he included the cost of the land. He said, "No, definitely not," he knew better than that. [182]

Q. After you totaled those figures to around \$21,000, and had this further conversation there with the Doctor, did you discuss any other items on that '47 return?

A. Yes. I asked him about medical equipment, new, as \$13,000, and X-ray equipment listed as \$7,000.

Q. Did he reply to that question?

A. He had very little in his files to substantiate that total of \$20,000; he again took me through the office and showed me some medical instruments—"this one cost \$300, this one \$500, you can see how much I have. It amounts to quite a bit of money." I asked him if he had anything to show me when those were purchased to prove they hadn't been deducted as expense in the year in which they were purchased and not capitalized, and since he didn't have it on hand at that moment, I would have to get the bills and statements from the various surgical supply houses, so that we could verify the figure and check it against the expense accounts he had listed for those years and for the year they had already been deducted as expense, and if the total of them would add up to \$20,000 as claimed.

(Testimony of Howard H. Whitsett.)

Q. After this first meeting with Dr. Lutfy, what was the next thing you did in connection with any investigation with this case?

A. I then went to the county records and checked. He had several rental houses here, and I checked the purchases and [183] sales of properties and any liens on mortgages. I went to the banks and totaled the bank deposits for the two or three years, including '47—'46, 47 and '48, to see how close his total bank deposits came to his total receipts as reported on the return, and they were somewhat larger. It was at that time that I stopped my investigation and waited until we could have a joint investigation with the Intelligence Unit.

Q. Explain a little further what you mean by "joint investigation"; just what that is?

Mr. Parker: I anticipate the witness is about to express his opinion about the case, what the agent did, and thereupon having arrived at a conclusion he turned it over to somebody else. I take it this witness has probably testified in many courts and understands that the defendant should not be prejudiced by his opinions regarding the merits of the case.

Mr. Royston: I will withdraw that question.

Q. You stated that you stopped your investigation until there could be a joint investigation with the Intelligence Unit?

A. Yes.

Q. What is the Intelligence Unit?

A. The Intelligence Unit is the branch of the

(Testimony of Howard H. Whitsett.)

Treasury Department that does the investigation in the cases of fraud or——

Mr. Parker: If the Court please, the witness is now stating [184] his opinion about the case.

Mr. Royston: He is stating what the Intelligence Unit is.

Mr. Parker: It is immaterial.

The Court: It may stand.

Q. After you referred the matter for joint investigation, what was the next thing that occurred as far as you were concerned?

A. It was sometime early in '51, I believe around the 4th of January, from there until about the end of April, we had Mr. Tucker, the Special Agent assigned to work with me, and had eleven conferences with the Doctor.

Q. You state Mr. Tucker was assigned to work with you?

A. Mr. Tucker of the Intelligence Unit.

Q. Mr. Tucker was from the Intelligence Unit?

A. That is right.

Q. You are from——

A. The Internal Revenue Agent's Office.

Q. Internal Revenue Agent's Office?

A. Yes.

Q. Then, in January of '51, was when this joint investigation began? A. That is right.

Q. At the time you started your investigation, were you investigating this 1947 return or were you investigating other [185] returns as well?

A. No. In the interim I had requested the re-

(Testimony of Howard H. Whitsett.)

turns from 1943 through 1948. That was the period covered by my technical investigation.

Q. Had you received the returns for that period?

A. That is right, I had.

Q. By January of 1951? A. Yes.

Q. You stated that you and Mr. Tucker then had eleven conferences with the Doctor, is that correct?

A. That is right.

Q. Approximately what period of time did these series of conferences cover?

A. January through, into April, I believe.

Q. In the year '51? A. '51.

Q. Where were these conferences held.

A. Most of them in the Doctor's office and two or three of them at the Internal Revenue Office in Phoenix.

Q. At these conferences, was anybody present other than you and Mr. Tucker and Dr. Lutfy?

A. Two of them, Dr. Lutfy's accountant, Mr. Racey, was present.

Q. Mr. Racey? A. Mr. Laird Racey. [186]

Q. That was Dr. Lutfy's accountant at that time?

A. Yes.

Q. During this period did you ever have occasion to examine Dr. Lutfy's office records in connection with his income from his professional practice?

A. Yes. In the first meeting with Dr. Lutfy in January, Mr. Tucker asked him to get copies of his bank deposit slips because we were unable to read his handwriting. He did this and we contacted him later and went over these deposit tickets and he iden-

(Testimony of Howard H. Whitsett.)

tified the names and whether they were the checks listed for rent or for patients' receipts, various others.

Q. There has been some testimony concerning a log book that was kept in the doctor's office; did you examine that?

A. After we had identified these names as nearly as possible on the deposit tickets, we compared them with the log book, and we compared them with the patient record cards.

Q. What do you mean by patient record cards?

A. I think the witness yesterday explained that when the patient comes in there is a card made out and the charges are listed on those cards and the visits that are made on the cards.

Q. That is the same set of cards Mrs. Way testified to yesterday? A. Yes.

Q. Did you examine any other records in connection with his profession? [187]

A. We examined the receipt books and also went through the checks.

Q. You state you examined the bank deposit slips, the log book, the patient cards and the receipt books, is that correct? A. That is right.

Q. What were the results of your investigation in connection with those four different methods of bookkeeping?

A. We found names and amounts on the deposit tickets we didn't find on the log book or on the patient's cards or on the receipt books. We found

(Testimony of Howard H. Whitsett.)

names in the log book we didn't find on the deposit tickets or on the patient's cards nor on the receipt books. We found names on the patient's cards, we found names and amounts, we didn't find were on the log book or were on the bank deposit tickets; and it was at that time that we discussed this with the Doctor and he said that evidently the log book was not complete, as we showed him patient receipts that weren't on it. He had destroyed some of the patient's cards that weren't regular patients and the receipts were only made out for the credits received directly into the office, not from mail receipts; so that no one record was complete enough to be positive that that was the entire receipts from the practice; and it was at that time we were forced to proceed on the net worth basis of arriving at the Doctor's income for the years in question.

Q. At the time you discussed the different methods of bookkeeping [188] with Dr. Lutfy, did you inquire of the Doctor if he had income from any other business or enterprise?

A. Yes. We had run onto some receipts on the deposit tickets from the Phoenix Sport Shop. We asked the doctor what that was for and he said, "For some cameras or guns or athletic equipment of that nature he had sold to the Phoenix Sport Shop." We looked in the phone directory and the City directory and found no record of a Phoenix Sport Shop. At a later date we asked him what the Phoenix Sport Shop was, and he said that was his own business. He had brought out stationery at that time that

(Testimony of Howard H. Whitsett.)

was headed "Louis P. Lutfy Company," and he said, "Now I am using this name because I had some difficulty getting my mail here at the doctor's office addressed to the Phoenix Sport Shop, that it confused the Post Office Department," so he changed his letterhead from Phoenix Sport Shop to Louis P. Lutfy Company, and he sold cameras, guns, sporting equipment to various people and purchased through this company name.

Q. This is Government's Exhibit No. 26 for identification; you testified that the Doctor showed you some stationery. I will ask you if that is what the Doctor showed you at that time?

A. Yes. He went through his desk and brought out this sheet of stationery to show us how he had that.

Mr. Royston: We will offer this.

Mr. Parker: I have no objection.

The Court: It may be admitted. [189]

A. We then asked him if he had—am I supposed to go on?

Q. Did you have any further discussion with Dr. Lutfy at that time concerning any books or records of the Phoenix Sport Shop?

A. He had a file of correspondence, but there was no book—we had no record of—a complete record of receipts. We asked him if he had a bank account and he said, "Yes, he had a bank account in the Bank of Douglas in the name of Phoenix Sport Shop." Up to that time we asked him if he had any other bank accounts and he said, "No." We

(Testimony of Howard H. Whitsett.)

had all the records of the bank accounts he had but there was none. We were unable to get any clear listing of the purchases or sales to this Phoenix Sport Shop or Dr. Lutfy Company.

Q. After Dr. Lutfy told you he was the Phoenix Sport Shop, did that enter into your consideration whether you should resort to the net worth method of computation in this?

A. Yes. We had no way of figuring whether there was any income from that at all because there were no records whatsoever.

Q. You stated that you resorted to the net worth method of computation after you examined the Doctor's books and records and had discovered this Phoenix Sport Shop. Explain to the jury what you mean by the net worth method of computation.

A. On the net worth method, you take the known assets of an individual at the end of a year and strike the total assets [190] he owned at the beginning of the year. This difference, plus any expenditures for personal items that wouldn't result in having an asset like notes and mortgages or property, is the income of the taxpayer for that year, and that income he should report on his return for income tax purposes.

Q. In this method of computation you state that you considered the assets of the taxpayer. Do you also consider the liabilities of the taxpayer?

A. You take the net value, net cost or investment in all the assets, that is the cost price less any

(Testimony of Howard H. Whitsett.)

amounts owned against that on any asset, loans or mortgages.

Q. State to the best of your ability in preparing the net worth statement in the case of Dr. Lutfy's tax returns, state just what items you used in preparing the net worth statement?

A. You use the ending balances of each year in all the bank accounts, the amount of investment in any piece of property, the cost less any amounts owned against that property, any notes or mortgages he owns, any automobiles, and as in the case of Dr. Lutfy, any medical equipment; then you take away any loans or mortgages and that in effect gives you the net value of his net worth at the end of each year.

Q. I will ask you whether you used all these items and from them prepared a net worth statement?

A. Yes, I did.

Q. Do you have that net worth statement with you now? [191]

A. No, I don't.

Q. Is this a typewritten copy of the net worth statement which you computed in connection with this case?

A. Yes, it is.

Q. This is a typewritten copy of that?

A. Yes.

Q. Government's Exhibit 33 for identification. You state this is the statement you prepared in connection with Dr. Lutfy's net worth for what period; did you state the period?

A. The period '46, '47 and '48.

(Testimony of Howard H. Whitsett.)

Mr. Roylston: I will offer Government's Exhibit 33 for identification into evidence.

Mr. Parker: If the Court please, this is rather a lengthy document and I haven't seen it before. It will take a little time to check it through. Can we reserve objection on it now until we have a chance to look at it?

The Court: I can appreciate the need to examine the record.

Mr. Parker: I don't want to hold up the trial of the case.

Mr. Roylston: What I want to do is have the witness testify from this statement. I am up to that point now and can't go any further.

Mr. Parker: If I might have a few minutes—I hate to say I can check this in three minutes but I will try. [192]

The Court: We won't require you to do that. Ladies and gentlemen, this is one of those necessary delays that happens sometimes and we regret always to have to interrupt a trial, but it is necessary sometimes in order to properly try it. It is necessary that we recess for a short time now, so we will stand at recess until 2:30.

(Recess.)

HOWARD H. WHITSETT

previously called and sworn, resumed the stand and testified further as follows:

Mr. Parker: If the Court please, with reference to Exhibit No. 33 for identification, right now I would register an objection to the fourth page of it which is not a part of the net worth statement at all. It is something else apart from the net worth statement. The first three pages is what the witness described the exhibit to be. The fourth page is a horse of an entirely different color and we object to that. I would like to ask the witness a question or two on voir dire with respect to the first three pages. Your Honor will observe that the net worth statement the witness described begins on page three, but before the exhibit is marked, as to the first three pages I would like to ask some questions on voir dire.

The Court: Do you have any objection to separating this, Mr. Royston? [193]

Mr. Royston: No, sir. We can just pull it off.

The Court: It will have to be re-marked.

Mr. Royston: Maybe if I can ask another question or two from this witness I can get the fourth page in now and won't have to pull it off.

The Court: Let us handle it this way: We will let Mr. Parker examine.

Examination

By Mr. Parker:

Q. The voir dire question I wish to ask, particularly if I may—Mr. Whitsett, I observed in this

(Testimony of Howard H. Whitsett.)

document labeled Exhibit 33, for each of the periods that are involved in this case certain items are labeled "cash on hand," which appear to be arbitrary. Is it true that those sums are an arbitrary assumption? A. Well, in one of the——

Q. Can't you answer that yes or no?

A. No, I am afraid not.

Q. It would be arbitrary or otherwise?

A. It was the Doctor's estimate of his cash on hand he gave to us at one of our conferences.

Q. Which one of the conferences?

A. March 16, and Mr. Racey was present that day.

Q. '51? A. '51, yes.

Mr. Parker: That is all of the voir dire. [194]

Direct Examination
(Continued)

By Mr. Roylston:

Mr. Roylston: I will offer Government's Exhibit 33 for identification into evidence.

The Court: Do you object to it, Mr. Parker?

Mr. Parker: Well, I have no objection to it as a hypothetical computation. I don't want to be in the position of conceding correctness of all the figures in here because there have been no original records brought into evidence to establish these other than the stipulations. Insofar as the stipulations cover them, they are admitted, but——

The Court: Isn't that what this is, the witness'

(Testimony of Howard H. Whitsett.)

opinion based upon what he concedes to be in evidence in the case?

Mr. Parker: Yes, that is what it is. I just want to keep that clear otherwise we can be swept away in a hypothetical situation and find ourselves in very great trouble getting back to the bank of the stream.

The Court: Are you getting at the proposition that you want to make it clear you are reserving your right to cross-examine as to the authenticity or accuracy of the figures what these support in the evidence?

Mr. Parker: And to put on my own accountant to show these computations aren't quite proper.

The Court: You certainly have those rights. It will be admitted as 33 in evidence. [195]

Mr. Royston: If the Court please, I am going to question the witness concerning this net worth statement now, and I have carbon copies of this statement which I would like to distribute to the jurors so they can follow what the witness is talking about. I will take the fourth page off of the copies.

(Counsel hands papers to jurors.)

The Court: The pages are numbered at the top, so if there is any reason for having page 4, you should separate it and hand it back.

Q. (By Mr. Royston): Now, Mr. Whitsett, in regard to this net worth statement, Government's Exhibit No. 33, will you start out from the very first of that and explain what the different items are on it and how you arrived at those figures, and as we go along, there will be a few items I want to

(Testimony of Howard H. Whitsett.)

ask specific questions about, but if you start under assets and explain how you set it up and tell us what each item is?

Mr. Parker: Although it may be a little bit slower, it would be far easier to make intelligent objections if this could be by interrogation rather than turn the witness loose and say, "go ahead, say anything you want to about this exhibit." It is rather a long one.

Mr. Royston: He can talk about anything on there, and anything else I will interrupt.

The Court: I will permit you to proceed as proposed. [196] However, if the witness goes beyond what he has been asked, counsel can object and if that happens we can probably do it by question and answer.

Q. (By Mr. Royston): Starting right out with the first item under assets there, explain just what those different columns are across there?

A. The columns are the year-end balances for the years ending 12-31-45, 12-31-46, 12-31-47, 12-31-48.

Q. Under assets you have a Roman Numeral No. I, headed Cash on Hand, and in Banks, and the first cash on hand. Explain what is meant by that statement, "Cash on Hand"?

A. Cash on Hand would be currency in the possession of the individual rather than assets represented by property or cash deposited in a bank account.

Q. It would be currency?

A. Currency, yes.

(Testimony of Howard H. Whitsett.)

Q. Where did you obtain these figures you used in that cash on hand?

A. Those were obtained from the Doctor's statement at this conference on March 16th, in the office of the Internal Revenue, where Mr. Tucker and Mr. Racey and Dr. Lutfy and myself were present.

Q. Did you do any other investigation in an attempt to establish whether these figures would be the approximate cash on hand? [197]

A. Yes, I did.

Q. What other investigation did you do outside of the Doctor's statement?

A. In my examination I had the 1943 returns, '43, '44 and '45. And I had the Office of Collector of Internal Revenue search their files and they gave me the information on the taxes paid as far back as the Doctor had ever filed tax returns.

Q. I will ask you if that information you obtained from your bureau concerning previously paid taxes are the same as Government's Exhibit 13 and Government's Exhibit 6? Government's Exhibit 6 is headed, "Certificate of Assessments and Payments." Is that what you used? A. That is correct.

Q. In the work you did you used——

A. The Form 899, Certificate of Assessments and Payments, and made up from the entire period of 1928 to 1948.

Q. With the use of these Certificates of Assessments and Payments, state how you used those certificates in your computation?

(Testimony of Howard H. Whitsett.)

Mr. Parker: Are you referring to cash on hand computation?

Mr. Royston: Yes, sir. Another method of computing cash on hand outside of the Doctor's admission.

Q. Go ahead and explain what the computation was you used [198] in arriving at this cash on hand other than the Doctor's statement of the cash on hand?

A. From 1928 to 1938 there was no record of return on file.

Mr. Parker: It appears to be a most round-about way of getting some evidence which seems to be wholly irrelevant and prejudicial before the jury. He says in answer to the question originally that the Doctor told him and he took the Doctor's estimate, and now this involves a method of getting into evidence matter which would not be relevant if offered directly.

The Court: As far as having said anything thus far he says he is basing it on Exhibits 6 and 13.

Mr. Parker: Yes, but he was beginning to make a statement which I consider prejudicial and which it seems to me quite irrelevant.

The Court: I think what he said so far is what appears on Exhibit 13. I am speaking without the exhibits before me.

Q. (By Mr. Royston): In relation to these exhibits, Exhibits 6 and 13, state just what computation you did and further establishing the cash on

(Testimony of Howard H. Whitsett.)

hand outside of the Doctor's statement of cash on hand?

A. I recomputed from the taxes paid by Dr. Lutfy through these years, the maximum amount of income reported on those returns. In 1934, there was no tax; 1935, \$82.56 tax paid; [199] 1936, no tax; 1937, no tax; 1938, no tax; 1939, \$7.33 tax; 1940, no tax; 1941, \$44.57 tax; 1942, no tax; 1943, is a combination of the '42 and '43, with the forgiveness.

Q. You refer to the military service during that period?

A. That is the forgiveness feature of the '42 return and the '43, when they started withholding taxes. The tax on Dr. Lutfy's return was \$235.38. The tax on Mrs. Lutfy's return was \$235.38. In 1944 the tax on Dr. Lutfy's return was \$837.50. The tax on Mrs. Lutfy's return was \$947.50. In 1945 the tax on Dr. Lutfy's return was \$484, and Mrs. Lutfy was \$384. The maximum net income during those years, taking their personal exemptions, and up to 1943 an earned income credit was allowed. On 1934 income maximum without paying any tax would be \$1,111.11. 1935 on tax paid, \$82.56, the maximum amount of income would be \$34.04, \$4,400. In 1936 there was no tax. The maximum amount of income was still the same, \$1,111.11. In 1937 the Doctor was married and had the additional exemption of his wife and he paid no tax. The maximum amount of net income would be \$1,944.44. In 1938 he paid no tax. The maximum amount of income would be \$2,777.77. In 1939 he paid tax of \$7.33, and at that

(Testimony of Howard H. Whitsett.)

time he had one child. The maximum amount of income would be \$3,452.83. In 1940 he paid no tax. The maximum amount of income was \$2,744.44. In 1941 he had two children and the tax paid was \$44.57. The maximum income would be \$3,793.61. In 1943 he [200] had three children and the maximum amount of income for that year was \$2,350, computed in conjunction with the '43 return. In 1943 we had his return and he reported an income of \$6,220.80. In 1944 we had his return and he reported income of \$9,779.57. In 1945 we had his returns showing his income at \$6,030.98. The total from 1934 to 1945 was \$44,721.10. I then applied an estimated living expense against this income of \$1,000 a year for the years 1934, 1935 and 1936. He was married in 1937 and I allowed \$1,500 living expenses; 1938, \$1,600; 1939 he had one child and it raised it to \$1,800; 1940 to \$1,800; 1941 with three children, \$2,000; 1942 to \$2,400; and for '43 and '44, \$3,600 each year. In 1945 when we had his checks we made an analysis and arrived at personal checks of \$6,842.02. The total living expenses for those years, '34 to '45, \$28,142.02. Taking these estimated living expenses for those years away from the maximum income of \$44,000, left a balance available for investments of \$16,579.08, and the total net worth we have as of 12-31-45 on page 3, total of the first column is \$58,337.20, and that discrepancy between the maximum amount available and the amount of assets on hand we allowed the \$1,000 cash that the

(Testimony of Howard H. Whitsett.)

Doctor estimated he would have on hand as of that date.

Q. All through this method of computation which you just described, you arrived at the \$1,000 figure, which is on page 1, independent of the Doctor's own statement of the estimate? [201] A. Yes.

Mr. Parker: If your Honor, please, at this time we move to strike all of that answer because it is evidenced he dreamed it up out of his imagination. It is obvious. He doesn't state he knew what the Doctor's living expenses were.

The Court: We end up with a result where he says he went along with the Doctor. I mean, there is really no calculation in that. When he is all through, he ends up with the statement that in taking all these into account he went a long way. He went along and allowed the Doctor \$1,000 and \$500 he claims.

Mr. Royston: Yes, sir. That is what we were getting at. This \$1,000 on here, it is to establish a starting point.

The Court: It may stand.

Q. On this net worth statement you stated that the cash on hand for each of the four columns across through there, that that was supplied by the Doctor, is that right? A. That is right.

Q. The next item you have is Checking Accounts. State how you arrived at each one of those figures included under Checking Accounts.

Mr. Parker: We stipulated to those checking ac-

(Testimony of Howard H. Whitsett.)

counts. I assume I got the same information we stipulated to.

Mr. Roylston: I want to show this is not all open and free as Mr. Parker is leading the jury to believe it was. [202]

Q. With reference to items 5 and 6 under Checking Accounts, the Bank of Douglas, in the name of Tiny Lutfy, and the First National Bank, 15th Street, when were those two items disclosed to you by Dr. Lutfy; when did you discover those checking accounts?

A. This trial was first set last October——

Mr. Parker: I don't want to delay this but he said he went to the banks, and as we all know the Internal Revenue can go to any bank at any time and get any information available to nobody else about our bank accounts. These bank accounts are not in any phony names, they are in the name of Lutfy. At least this Tiny Lutfy account is. The Phoenix Sport Shop, you can see is more or less an inactive account, that decreased over the years.

Mr. Roylston: I am going to object to this type of stuff. This is wholly argumentative.

Mr. Parker: But if it is Tiny Lutfy's account, I think it is most unfair and prejudicial to try to weave out of this thing some sinister fabric when the thing is in the name of Lutfy.

Mr. Roylston: As far as these statements of Mr. Parker, I am going to object to them. He keeps going further and further and my patience is about

(Testimony of Howard H. Whitsett.)

worn out and I am going to object to these argumentative discussions before the jury.

The Court: The great difficulty is that you are both [203] ahead of all of us by virtue of having entered into the stipulation. I don't know who Tiny Lutfy is, what connection, if any, she has with the Doctor. I don't know what the thing means on here, and counsel has just asked the witness when it was first disclosed to him—disclosed by whom? I think the objection has a good point.

Mr. Royston: I will rephrase the question.

Q. These items listed under Checking Account, did you discuss these specific accounts with Dr. Lutfy? A. Not all of them.

Q. When did you first discuss any of these checking accounts with Dr. Lutfy?

A. The items 1, 2, 3 and 4, we did discuss with Dr. Lutfy during the examination of the returns.

Q. That was in what period of time?

A. January to April, '51.

Q. During that period of those conferences with Dr. Lutfy, did you ask him if he had any further accounts? A. Yes, sir.

Q. What was his answer to that?

A. He said those were all of his accounts.

Q. Number 5 under Checking Accounts is listed as Bank of Douglas, Tiny Lutfy. During your investigation did you determine who Tiny Lutfy was?

A. Tiny is the nickname of Mrs. Bertha [204] Lutfy.

Q. Tiny Lutfy is Bertha Lutfy?

(Testimony of Howard H. Whitsett.)

A. Bertha Lutfy.

Q. When did you first discuss the bank account listed under item 5, Bank of Douglas, Tiny Lutfy?

A. When the trial was set last October, we subpoenaed the records from the bank, and they brought in that additional account that we had never been upon before.

Q. With reference to item 6 under Checking Accounts, when did you discover that?

A. At the same time. The First National Bank brought in this additional bank account which we had never seen before.

Q. The next item is listed as Savings. Explain just what that is?

A. These are amounts deposited in the Savings Banks as distinguished from the checking accounts.

Q. These are Savings Accounts? A. Yes.

Q. Did you discuss these accounts with Dr. Lutfy in early '51?

A. Number 1 and number 2 only.

Q. When did you discover the account listed as No. 3, Bank of Douglas, Tiny Lutfy?

A. At the same time we found No. 5 and 6 under the checking accounts.

Q. That was in late '53? [205]

A. Late '53.

Q. The next item you have listed on the Net Worth Statement, you give the totals, you have got totals listed. What are those the totals of?

A. Those are the totals of cash on hand and in banks in the years ending '45, '46, '47 and '48.

(Testimony of Howard H. Whitsett.)

Mr. Parker: Before we go to another subject matter, I want to point out to your Honor that this witness testified in this last series of questions that he asked Dr. Lutfy what accounts he—Dr. Lutfy—had, and he said, “these,” pointing out the ones that were Dr. Lutfy’s accounts—“these are all the accounts I have.” Now, he is implying that because Dr. Lutfy answered the question, which he says he asked Dr. Lutfy, and then didn’t go ahead and volunteer the other information about his wife’s account, which there has been no testimony he asked him about, that there was in some manner something wrong about it. It creates an unfavorable impression with this jury and I honestly believe it is an unfair proposition and I move to strike the last series of questions and answers about these bank accounts.

Mr. Royston: If the Court please, I just want the jury to know the facts in this entire matter. I will ask this further question.

Q. When you were investigating the returns that Dr. Lutfy filed, just how were these returns listed; who were the taxpayers [206] on those returns?

A. They were separate community property returns filed in 1946 and 1947 for the Doctor and his wife where they split the income.

Q. At the time you were investigating these tax returns, were you investigating Government’s Exhibit 1, which is Bertha A. Lutfy, as well as Government’s Exhibit 2, which is Louis P. Lutfy?

A. Yes.

Q. Did you inform the Doctor of that?

(Testimony of Howard H. Whitsett.)

A. Yes.

Q. Did you examine Government's Exhibit 3, which is Louis P. Lutfy and Government's Exhibit 4, which is Bertha A. Lutfy? A. Yes.

Q. Did you advise the Doctor of that fact?

A. Yes, sir. With the community property income, we examined the entire amount.

The Court: The motion to strike will be denied. The jury is aware of the questions that were asked and the answers that the witness gave. He was asked when he discovered the bank account. You would have to assume something that he didn't say to get out of that any intention that any misrepresentation had been given.

Q. With reference to Roman Numeral II, Notes and Mortgages Receivable, explain just what is meant by this specific item? [207]

A. In this case, A, B and C, these are mortgages or contracts held by the doctor after he had sold these particular pieces of property, and are the balances owed to him at the end of each year.

Q. These are amounts owed to Dr. Lutfy?

A. Owed to Dr. Lutfy.

Q. What is Item No. D?

A. Item D was, as I understood from the Doctor, a loan made to this man, James E. Porter, and he had some title to this Lot 17, Block 7, West Phoenix Addition, during the time the loan was in existence, as he wasn't the owner of the property. It was more or less collateral. It was in the nature of a personal loan.

(Testimony of Howard H. Whitsett.)

Q. Were you able to determine with reference to these items listed under Notes and Mortgages Receivable, were you able to determine from the Doctor's records or from discussions with the Doctor whether there was interest received on these notes?

A. Yes. The Doctor had records of how much each individual owed and the amount of interest and principal payments of each payment made.

Q. Did you check the income tax returns of the Doctor in an effort to determine whether these interests were reported on the income tax returns?

A. They weren't all reported. [208]

Q. Do you know which were and which were not reported?

A. I couldn't say which ones from here, no. If the total wasn't on the return. It wasn't the same amount as the total on his records.

Q. The totals you have listed there at the bottom of the first page, that is the total of what?

A. That is the total of notes and mortgages receivable at the end of each year.

Q. It is just the total of everything under Roman Numeral II?

A. That is right.

Q. It doesn't include I?

A. It doesn't include I.

Q. On page 2, Roman Numeral III, headed Stocks and Bonds, will you explain what you investigated under that particular heading, and what these mean?

A. These are investments in stocks and bonds

(Testimony of Howard H. Whitsett.)

that Dr. Lutfy owned at the end of these years; investments made by him.

Q. Then you have listed the totals?

A. That is the total of the stocks and bonds only.

Q. With reference to Item 4 headed Automobiles. Explain just why this item, automobiles, is in the net worth statement?

A. An automobile is an asset, and these are the cost values of these assets as of the end of each year. Some, as [209] in A, he traded in and bought and there was quite—several changes throughout that period.

Q. Before we go into that let me ask you this question, if an automobile is a type of asset which is subject to depreciation?

A. If it is used in your trade or business it is subject to depreciation, yes.

Q. Explain what you mean by asset being subject to depreciation?

A. Depreciation is an expense allowance for assets that have a longer life than one year. In the case of an automobile, they will last longer, usually, than one year, and you spread the cost basis of that asset, if it is an allowable expense item, over the life of the asset, instead of taking the full cost in one year and having no expense in the next year. It is apportioned over that life of the asset, whether it is an automobile or rented property buildings, and so forth.

(Testimony of Howard H. Whitsett.)

Q. You stated that to be subject to depreciation an asset must be a business asset, is that correct?

A. Yes. It must be used in your business in the earning of your income.

Q. On these items listed under Automobiles, did you examine the Doctor's returns in reference to the automobiles? A. Yes, I did.

Q. Did you find the automobiles listed under depreciation? [210] A. Yes, I did.

Q. How did the Doctor depreciate the automobiles in the return?

A. He depreciated them as being used entirely in his business over a period of five years.

Q. He depreciated them as one hundred per cent business use? A. Yes.

Q. Would expenses of operating an automobile, if used in business, be deductible?

A. Yes. The business portion would be deductible.

Q. Any expenses used in business?

A. Yes.

Q. Did the Doctor take the automobile expenses as a business deduction? A. Yes, he did.

Q. Were you able to determine what percentage of the expenses he listed as business expenses?

A. He deducted them all.

Q. Did you make any adjustment on the claimed depreciation as far as your computation is concerned?

A. Yes. In the years when he had one automo-

(Testimony of Howard H. Whitsett.)

Q. I adjusted it to 80% business and 20% personal.

Q. To 80% business and 20% personal use?

A. That is right. [211]

Q. These are the years when he had one automobile? A. Yes.

Q. The totals under this item of Automobiles, that applies only to the different items listed under automobiles, is that correct?

A. That is the total of the automobiles only.

Q. The next item, Roman Numeral IV, is headed Medical Equipment. Will you explain how you arrived at these different items listed here?

A. The medical equipment here as of December 31, 1945, that figures is \$4,110.34, was taken from the Doctor's inventory of his medical equipment, less the assets that had been sold during the year for previous years, excuse me, and this was the balance that depreciation would be allowed upon and was as of December 31, '45. In 1946 he purchased an X-ray machine, since he sold the other X-ray machine, I believe, in 1945, and that is the cost plus the freight.

Q. This \$3,734.34 is the cost plus freight?

A. That is right.

Q. The next item, the File Cabinets, how do you arrive at that figure?

A. In going through his checks, we found checks for equipment, and this particular one was for file cabinets in the amount of \$249.60, that he purchased in '46.

(Testimony of Howard H. Whitsett.)

Q. The items E and F listed as Equipment and Furniture; [212] how did you arrive at those figures used in those columns?

A. Those are totals of checks made during those years and identified by Dr. Lutfy as being items of a capital nature that he had in his office as equipment or furniture.

Q. Your totals for the year ending in 1946 show that the Doctor had medical equipment of \$8,294.28, is that correct? A. That is right.

Q. What did the Doctor list on his return for depreciation purposes as being the value of his medical equipment for that year?

A. Medical equipment is listed as 13,000, and the X-ray machine was set up separately as a cost of 7,000, total 20,000.

Q. That X-ray machine, that is the one listed as \$3,734.34 as being the price plus freight?

A. That is right.

Q. You state that was set up in the return at a cost of 7,000 for depreciation purposes?

A. That is right.

Q. With respect to the year ending 12-31-47, you have the medical equipment listed as \$9,259.50. Refer to the Doctor's return for the year 1947 and state what amount the Doctor used as medical equipment for the purpose of depreciation.

A. He claimed that the cost basis was 13,000 for medical equipment and 7,000 for the X-ray. [213]

Q. The 7,000 was in addition to the 13,000?

A. That is right. The total would be 20,000.

(Testimony of Howard H. Whitsett.)

Q. With reference to the year ending 1948, you have that the total medical equipment is \$10,028.30. Referring to the '48 return state what the Doctor listed as medical equipment for depreciation purposes.

A. He claimed the same amount as in '46 and '47, 13,000 cost for medical equipment and 7,000 cost on the X-ray.

Q. Will you explain for the purposes of clarification, if the taxpayer lists for the purposes of depreciation a cost in excess of the actual cost, does that work for the benefit or detriment of the taxpayer?

A. That increases his depreciation expense allowed or claimed for that year and reduces the taxable income.

Q. If the depreciation is increased the taxable income is decreased, is that correct?

A. Yes. Depreciation is an expense and taken away from the income.

Q. It results in a lower tax being paid?

A. That is correct.

Q. Did we cover 1948 of \$20,000 depreciation?

A. Yes.

Q. The next item that you have listed is Real Estate. How did you arrive at these figures you have listed in real estate? [214]

A. From the public records.

Q. As far as item A is concerned, what was that particular piece of real estate?

(Testimony of Howard H. Whitsett.)

A. That item A is 1305 East Granada, was the Doctor's residence up until June, '48.

Q. You have furnishings listed there; what is the purpose of furnishings being listed?

A. His accountants have informed us that he valued the furnishings that was sold with the house in '48 at \$2,000.

Mr. Parker: I understand that—if I understood it—it is purely hearsay that he said somebody else's accountant informed him Dr. Lutfy valued the thing at \$2,000. I move to strike it if I heard it right. It would be hearsay.

The Court: I believe the statement was that the accountants told him he sold it for that.

A. He sold the house and valued the furnishings at \$2,000 that were sold with the house.

The Court: Who told you this?

A. We received word through his accountants.

Mr. Parker: It is heresay now.

The Court: It may be stricken.

Q. Was it Mr. Moser that told you that?

A. Mr. Moser didn't tell me that.

Q. Where did you get this figure of 2,000?

A. From the Penal Division's figures in Los Angeles when they had a conference on this [215] case.

Q. Conference with whom?

A. Mr. Cass, the Government Representative in Los Angeles in the Penal Division.

Q. Was this 2,000 figure received from Dr. Lutfy or one of his accountants?

Mr. Parker: The questions are leading and sug-

(Testimony of Howard H. Whitsett.)

gestive. Counsel isn't getting any closer to the original thing. The witness hasn't said anything at all to deprive us of the hearsay quality.

The Court: Objection sustained.

Mr. Parker: In the moment of pause I have had an opportunity to discuss this matter with Mr. Moser and I am advised we have no objection to including this item. And we will stipulate that the furniture in that particular property which was sold furnished was of the estimated value of \$2,000.

Mr. Roylston: Either way is all right with us. It can go in or out, it doesn't make any difference to us.

The Court: If counsel is willing to stipulate.

Mr. Roylston: Do you want it in?

Mr. Parker: Yes.

Mr. Roylston: All right, let us put it in.

Mr. Parker: By stipulation?

Mr. Roylston: Yes, sir.

Q. (By Mr. Roylston): Under item B you have listed Paving and Remodeling. What are those items in there for? [216]

A. Those are expenses we found in going over the checks. For paving there was an assessment in 1946 for \$487.95 on that property.

Q. Was this rental property?

A. Yes. The 1123 North Seventh Street is a rental property.

Q. On rental property is the taxpayer allowed to depreciate improvements to rental property?

A. To the building, not to the land, and paving

(Testimony of Howard H. Whitsett.)

is an added item to the cost of the land and it is not depreciable.

Mr. Parker: Is the witness stating that paving does not depreciate?

Mr. Royston: The pavement is not a depreciable item, I believe was his statement. It is an assessment to the real property rather than any improvement to the building.

The Court: The way he is stating it, if I understand, it is treated like land for the purpose of depreciation.

Mr. Parker: If it is understood he uses that theory for his purposes it is all right with me. Whatever theory he uses.

Q. (By Mr. Royston): Under item D you also have land improvements listed there, is that correct?

A. Yes.

Q. \$310?

A. That was for landscaping, planting trees, bushes. That [217] also adds to the cost of the land. It is not by Internal Revenue laws allowed for depreciation purposes.

Q. You have a building under item D listed at \$21,429.07, and I believe that is stipulated to.

Mr. Parker: I don't know. I haven't added up the data. Not specifically in that amount. We may have stipulated to other items added together would make that.

Mr. Royston: The total is \$21,429.07, is that correct? A. That is correct.

Q. Referring to the Doctor's—

(Testimony of Howard H. Whitsett.)

Mr. Parker: Just a minute. On that, we stipulated to the amount he paid to the contractor and the architect, and I think that, without the land, would amount to the sum you have, but we haven't stipulated on any other.

Mr. Royston: From the items which you were able to determine went into the actual cost of the building amount to \$21,429.07?

A. That is right.

Q. Will you refer to the Doctor's return for that period and state what building was listed on the returns for depreciation purposes?

A. This building was completed in '46, and on his '46 return this is his office building that I questioned him about on my first visit where he claimed a cost of \$30,000, and the \$21,000 was all we were able to find. [218]

Q. And the Doctor depreciated it at \$30,000?

A. That is right.

Q. Item E you have listed under the year 1945; what was that transaction?

A. That was the ownership of a one-third interest in a corner lot and buildings at the corner of Central and Moreland. That was his equity or one-third interest in that building which was sold in 1946.

Q. Item F is listed under 1945, and what is that?

A. That is a vacant lot at Fifth Avenue and McDowell that he purchased in 1945 and sold in 1945.

Q. Item G, is that rental property, item G?

A. Yes. That is the lot next door to item D.

(Testimony of Howard H. Whitsett.)

Item D is Lot 9, Block 14, Kenilworth, and G is Lot 10, Block 14, Kenilworth.

Q. \$6,014.24 was the price of the lot with a building on it?

A. There was a building on the rear of that lot.

Q. Under that same item there is, Remodeling Old House for the Year 1947, \$1,861.26. Is that the cost of remodeling that house?

A. That is the item we found in going over the checks that could be identified, or that Dr. Lutfy identified, as being used in the remodeling of this house which he made over into an office and rented as a doctor's office. [219]

Q. Now referring to the Doctor's return for the year of '47, state how that item of remodeling the old house was listed for depreciation purposes and in what amount it was listed?

A. The remodeling wasn't listed on the '47 return.

Q. '48 return for the year '47 is what I meant. No, this is the year '47, listed on '48?

A. It was remodeled during the year 1947.

Q. It is not listed on the '47 return?

A. No.

Q. Is it listed on the '48 return?

A. Yes, sir. There is an item—remodeling, listed 1-1-48 of \$5,000. I asked the Doctor about that item and he said it was the combination cost of the remodeling of this house on the back of the lot at Third Avenue and McDowell and the remodeling of the building on 1123 North Seventh.

(Testimony of Howard H. Whitsett.)

Q. Item B? A. Item B.

Q. So, in other words, the figures you arrived at, \$181.54 and \$1,861.26, the Doctor had lumped those two together on the return at \$5,000, is that correct?

A. That is right. He made one remodeling item of \$5,000.

Q. You have under item G a building listed under 1948 at \$15,356.42. Is that a different building from this house that was remodeled? [220]

A. Yes. That is a wing he put on the building under item D.

Q. That is the office building?

A. That is his office building. He added a wing to that building in '48 and rented it out as a doctor's office.

Q. From the Doctor's records, you determined that the cost of that building was \$15,356.42?

A. That is right.

Q. Will you check on the return for the year '48 and see the amount the Doctor listed as the cost of that building for the purposes of depreciation?

A. Under the original office building he has an addition to the office acquired July 1, '48, cost of \$20,000.

Q. It was listed as 20,000 for depreciation?

A. That is right.

Q. Item I was a vacant lot at the time it was acquired in 1946, is that correct?

A. Items H and I are both vacant lots.

(Testimony of Howard H. Whitsett.)

Q. Item H is a vacant lot valued at \$6,414.43?

A. Yes.

Q. Acquired in '47? A. Yes.

Q. Still held in '48? A. Yes.

Q. Item I is at a cost of \$6,670.71, is that [221] correct?

A. Yes, sir. That is where he paid for his home.

Q. Item J, Seventh Avenue and Maryland. What is this particular piece of property?

A. That is the triplex, the cost of the triplex at Seventh Avenue and Maryland.

Q. That is the piece of property Mrs. Way testified to yesterday? A. Yes.

Q. They call it the triplex? A. Yes.

Q. Now, you have furnishings listed there at \$3,423.50. This is where the Doctor lived at this address during this period of time?

A. Yes, after he sold 1305 East Granada, yes, sir.

Q. Is a personal residence subject to depreciation? Can a taxpayer claim a personal residence for the purposes of depreciation? A. No, sir.

Q. Will you check the Doctor's '48 return and see if he claimed a residence for depreciation purposes?

A. He has down here a concrete block duplex, which he explained was actually the triplex, at \$20,000, and took depreciation on all of it, and the furniture he has listed as \$3,357.50. He acquired the furniture by trading his Buick Convertible, and that is being, has been depreciated [222] one hundred per cent.

(Testimony of Howard H. Whitsett.)

Q. He depreciated the furnishings?

A. He depreciated the house and the land and the furniture.

Q. The house and land and furniture, all of the residence?

A. Yes.

Q. You have a list of the totals across there. That first list of totals, that is the total of the real estate, is that correct?

A. That is the real estate only.

Q. So, at the end of the year 1945 the real estate was \$36,602.14, and it included up until the end of 1948, \$93,920.59, is that correct?

A. That is right.

Q. You have next the total assets?

A. That is the total of pages 1 and 2.

Q. That is the total of all items we have discussed up to now?

A. All the items.

Q. You have those totals, \$61,662.95, at the end of 1945 and that increases up to \$131,129.43 at the end of '48?

A. That is correct.

Q. That completes the assets in your net worth statement?

A. That is right.

Q. What is the purpose of page 3 in this computation?

A. The totals on the previous page are reduced by the [223] amounts of money owed against the properties or any personal loans that might be outstanding at the end of any one particular year.

Q. In other words, before you arrived at the net worth you subtracted the taxpayer's liabilities from his assets?

A. That is correct.

(Testimony of Howard H. Whitsett.)

Q. After taking his liabilities from his assets it leaves the net worth? A. That is correct.

Q. The first item, Roman Numeral VII, Mortgages Payable, what is that?

A. Those three items are loans or mortgages against these properties; Frances Rose Cordell is the mortgage against this property. Under J, Seventh Avenue and Maryland, triplex, at the end of '48 he owed \$10,000. Under B, First Federal Savings and Loan Association, is \$10,615.85, that he borrowed from the First Federal Savings and Loan when he was building his office, the first building, and under C, Northwestern Mutual Life Insurance Company, is the amount of the loan that he borrowed in 1948, and he owed \$14,800 against that as of December 31, 1948.

Q. The next item you have listed is Roman Numeral VII, Outstanding Checks. What is meant by that?

A. These are items of checks that Dr. Lutfy had written perhaps the last two or three days of the year but had not [224] cleared the bank, and they adjust the bank account to the actual amount of money. According to the Doctor's own record, he had written these checks that are listed there in total but they had not cleared the bank, and it is in effect a liability.

Q. So, in other words, you list the bank deposits as assets, but if there are any outstanding checks in any of these periods, you deduct those as liabilities?

A. Those bank balances at the end of the year

(Testimony of Howard H. Whitsett.)

are listed as assets and these are owed against those assets so deducted as liabilities.

Q. The next item you have listed as Depreciation Reserve (See Schedule). Explain what is meant by depreciation reserve?

A. Each year that you are allowed your depreciation expense, that expense is added and the offsetting and accounting debit or credit, in this case is the credit for the expense, is the reserve, and that carries from one year to the next as long as one asset is still owned upon which depreciation has been allowed. As soon as the asset has been sold, the depreciation reserve is debited for the amount of depreciation expense over the years of life of that asset. That has been allowed and is a part of that reserve. It is then taken out and you only have the amounts accumulated that have been allowed in prior years. This reserve figure represents the [225] amount of depreciation expense allowed during that year in '45, \$3,311.65. That includes the year '45 and only prior depreciation allowed on the assets that are on the statement listed under the year 1945, and the same in the other years.

Q. This depreciation reserve is listed as a liability and that is deducted from the taxpayer's assets? A. That is correct.

Q. The next line is the total liabilities. That is the total of everything on this page down to that line, is that correct? A. That is right.

Q. The next line you list the net worth at the close of year?

(Testimony of Howard H. Whitsett.)

A. That is the figure that you arrive at after taking the total liabilities column line away from the figure on page 2 of total assets at the bottom of the page.

Q. That is the difference between his assets and liabilities?

A. That represents the difference between his assets and his liabilities.

Q. Then the next line is net worth beginning of year. That is at the beginning of that particular year for the purposes of subtracting it from the amount at the end of the year?

A. That is where you arrive at the increased net worth for that particular year. You take the ending net worth and [226] subtract the beginning net worth and the difference is the amount that the net worth has increased during that twelve-month period.

Q. For the year 1946, at the end of the year of 1946, Dr. Lutfy's net worth was \$65,588.43, is that correct? A. That is right.

Q. During the year 1946 his net worth increased \$7,251.23, is that right? A. That is right.

Q. For the year '47 Dr. Lutfy's net worth was \$74,265.11 at the end of the year, is that right?

A. That is right.

Q. And his net worth had increased during that year \$8,676.68, is that correct?

A. That is right.

Q. For the year '48 at the end of the year Dr.

(Testimony of Howard H. Whitsett.)

Lutfy's net worth was \$97,294.73, and during that year his net worth had increased \$23,029.62?

A. Yes.

Q. I am going to show you this.

Mr. Parker: There is a motion which I have in mind with respect to some of the testimony just given; however, I will not interrupt now but wait for the recess to make it. It has to do with the bill of particulars and various amendments thereto and there is a certain departure of the evidence, [227] it seems to me, from that.

The Court: We will recess very shortly because I have another matter at 4:00 o'clock.

Q. I am going to show you this document marked as Government's Exhibit 34 and ask you if you prepared the figures on that document?

A. Yes, I did.

Q. How did you arrive at the computations on that document? What was used in arriving at those particular figures?

A. There were capital gains.

Q. What I am getting at is, did you use your net worth statement, Government's Exhibit 33, in the preparation of this document?

A. Yes.

Q. Government's Exhibit 34 for identification?

A. That is right.

Q. You prepared this yourself, I believe you stated?

A. Yes, sir.

Mr. Royston: I will offer 34 for identification into evidence.

Mr. Parker: If the exhibit is for the purpose of

(Testimony of Howard H. Whitsett.)

proving he prepared it, all right, but there is no foundation laid for it here as far as establishing any of the facts other than the capital gains as shown by his computation for the various years. That is the only thing. We don't agree [228] with his method of figuring income tax at all, and I don't think the Court will when I point out the obvious and manifest errors in it.

The Court: I will excuse the jury at this time and we can take up your motion and also this other matter. I have another case at 4:00 o'clock so we will have to adjourn for the day at this time. I will excuse you now until 10:00 o'clock tomorrow morning.

(Whereupon the jury retired from the Courtroom.)

Mr. Parker: I move to strike all of the testimony about improper depreciation because I think it should have been objected to and excluded at the time, except I overlooked the connection at that time. Furthermore, I am going to register for the record at this time a motion for a continuance in this case in order that we may have time to prepare because I avow to the Court that we have relied on these figures the Government gave us on net worth for the whole period, and we have done an enormous amount of work predicated very largely on that and we are now being confronted with an entirely different set of figures. For that reason I move that the defendant be allowed a reasonable

(Testimony of Howard H. Whitsett.)

recess of this trial for the purpose of meeting the new set of figures with which we are now confronted with respect to net worth.

The Court: I will recess this case until [229] 9:30.

September 10, 1954, 9:30 A.M.

The Court: The record may show that the jury is absent. Is the defendant here, Mr. Parker.

Mr. Parker: I advised him he wouldn't be needed at this argument. He is voluntarily absent. The record may show that.

The Court: I have given consideration to the motion to strike the evidence as to depreciation, and I am going to reserve ruling on it at this time. In other words, it won't be granted at this time. I will reserve ruling also on the motion for a continuance; however, I do want the Government to give me a statement as to each year as to the difference in unreported income or claimed unreported income; the difference that is accounted for by your recasting a depreciation plan, by your recasting the capital gains or losses, and by your recasting any deductions that were claimed on the return for which you now have disallowed. What I am getting at, any claim that was made on these returns such as for depreciation which the Government now contends was excessive and is recasting and thereby accounting for claimed unreported income on any capital gains that were on the return or in the return, and you now have applied a basis other than that

(Testimony of Howard H. Whitsett.)

claimed by the taxpayer and that accounts in part for some of the unreported income. [230]

Mr. Parker: I wish to modify the motion I made yesterday for a continuance that was made in haste by saying that I believe there will be no such continuance as I indicated yesterday would be necessary, but that some interval of time, a short interval of time would be necessary to complete our accounting and to revamp it.

The Court: I have ruled on it and it will stand. I think we have left the matter of Exhibit 34 which was offered by the Government, the fourth page.

Mr. Parker: I think I have already stated an objection to that.

The Court: At this particular time on this I propose to admit 34. The only thing I can say to you, Mr. Parker, is that if after the witness explains it, as I assume he will have to in order that it can be understood, and after you have cross-examined him, if there should be a basis for a motion to strike it, we will do that. I don't know any other way to handle it.

Mr. Parker: Very well. There is one other matter I should like to take up before the jury comes into the courtroom. As a precautionary matter, I would like to ask the Court before adjourning over the week end to again remind the members of the jury that they are not to read any newspaper accounts of the case.

The Court: I will try to bear that in mind. If I [231] should forget, will you and the Government

(Testimony of Howard H. Whitsett.)

Counsel come to the bench and remind me of it so that I can do that? Let the record show that the defendant is now present.

(Whereupon the jury returned to open Court.)

The Court: Exhibit 34 for identification will be admitted in evidence.

HOWARD H. WHITSETT

previously called and sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Roylston:

A. These are copies of Exhibit 34 which was just admitted. Mr. Whitsett, you were testifying yesterday afternoon concerning this computation which is now marked Government's Exhibit 34. Will you state the difference between this Exhibit 34 and Government's Exhibit 33, which was the net worth statement, and how this applies to the net worth statement?

A. The net worth statement is in theory the balance sheet of the taxpayer, and this takes that difference between the ending and beginning balance and adjusts it to arrive at the taxable net income.

Q. In other words, you take the results of the net worth statement and compute the unreported net income on this [232] particular sheet?

(Testimony of Howard H. Whitsett.)

A. Yes.

Q. Testifying from Government's Exhibit 34, the first matter is headed Expenditures Not Reflected in Above Increases. Will you explain what that means?

A. This includes any adjustments for capital gains and capital losses or ordinary losses, and you add any living expenses either by cash or by check that are not reflected and do not include any of the assets.

Q. Under item 10 you have Adjustment for Capital Gains and Losses, and A states "add loss on sale of auto," and you have \$684.42 entered under the column for the year ending 12-31-47. What does that particular item mean?

A. In this particular case, an automobile was sold at a loss. You add back in the losses at the full amount and if you will look under 13B you then take out the amount of the allowable loss. Sometimes all of it. In this case it was part of the loss for business and part was for personal. The business portion of the loss is allowable and the income is reduced by that portion. The balance was personal loss and is not allowed as a deduction.

Q. In other words, you testified yesterday that the automobiles were divided, if there was one automobile only it was divided 80% business and 20% personal use, is that correct? [233]

A. That is right.

Q. Then that loss on the sale of an automobile,

(Testimony of Howard H. Whitsett.)

the percentage of business use is allowable as a deduction to the taxpayer, is that correct?

A. That is correct.

Q. The percentage which is personal loss is not allowable, is that correct? A. That is correct.

Q. Under item B under No. 10, you have subtracted capital gains 100%, then you have an item listed in three different columns, you have three different items listed in three different columns, what does that particular item refer to?

A. That represents the full amount of any gain made on any sale of a capital asset and is all added back, I mean all taken out of the income entirely in this, under 10 and under 13A, the portion that is taxable only in capital gains. If the asset is held over six months it is only taxable to 50%, and in 13A you add back the taxable portion of that which in effect eliminates the nontaxable portion from the income and the taxpayer is not taxed with that.

Q. You have subtracted \$6,918.55 under 10B, and then you add that same amount back under 13A; is that the item which the Government contends that particular piece of property was held for less than six months?

A. That represents two pieces of property were held less [234] than six months.

Q. If a particular asset was held less than six months, then in your computation you tax it?

A. One hundred per cent.

Q. Now, the next item you have listed as Living

(Testimony of Howard H. Whitsett.)

Expenses. Just where did you obtain those items and what do they refer to?

A. These living expenses, "A—paid by check," is an item we found in going over the checks for personal living expenses.

Q. These are cancelled checks of Dr. Lutfy?

A. Cancelled checks, yes. That is the total of those for each year.

Q. Then the living expenses, the cash estimated, how did you arrive at those figures?

A. Those figures, we asked the Doctor how much he estimated his cash living expenses would be because we found practically no checks for groceries or personal items of that type in his checks, and he in computing it said that during the year before when he was in the service he received the family allotment of, I believe, \$50.00 for the wife and \$35 or 40 for the first child and 20 for each additional child, about \$125 a month; and that his wife, when he returned from the service, was very proud of the fact she was able to live on that amount of money while he was in the service, and hadn't had to use their capital, so he estimated that was the [235] approximate amount of living expenses for that year, and he thought perhaps in '47 and '48 it would amount to a little bit more.

Q. So those items were given to you by Dr. Lutfy?

A. They were.

Q. The next item under Living Expenses is Lincoln Continental Convertible, and under the year ending '47 you have listed \$5,420. Will you explain

(Testimony of Howard H. Whitsett.)

why this particular automobile is listed under the living expenses?

A. That automobile was an automobile purchased by the Doctor in the fall of 1947 and it was stolen, and the Doctor, of course, had insurance and sued to get recovery from the insurance company; so there was no loss to be allowed on that until there was a final settlement by the insurance company. That is an income tax regulation that if you have a claim you have no loss until the claim has been settled.

Mr. Parker: I move to strike that statement. The witness is not giving us a lecture on the law of income tax. I have no objection if he states what he did in connection with this, but we disagree with him most stringently on the point.

The Court: When the witness refers to the law, we will instruct the jury that the witness means his version of the law as a tax expert and his understanding of the regulations. That is what we will understand, Mr. Parker, just as [236] when your expert takes the stand. We will have the same understanding.

Q. Was this item, \$5,420, was that stipulated to as a cash expenditure?

A. Yes, sir. It was stipulated by both parties.

Q. The next item you have is Number XII, Depreciation Allowable Not Reflected in Reserve Increase. What does that mean?

A. Your reserve increase only takes into consideration the depreciation allowed on the assets

(Testimony of Howard H. Whitsett.)

that are still in possession of the individual. This amount in Number XII represents the depreciation allowable in that particular year on an asset that has been sold. It is allowable expense for that year; however, the asset is not in the balance sheet any more and the reserve does not reflect that deduction, so it is an additional deduction allowed for that specific year.

Q. So this is an additional deduction in favor of the taxpayer, is that correct?

A. That is correct.

Q. Then the next line across is the total for each of these columns down to that point?

A. That is right.

Q. The next item you have is Capital Gains and Losses. Will you explain what A and B each mean under that and how they are applicable here? [237]

A. In A you add back the taxable portion of the capital gain that was stricken in item 10B, which was \$6,918.55 in '46, \$2,363.16 in '47. You will notice in '48 the asset was held over six months and the amount added back in there is just half of the amount in 10B of \$1,883.65.

Q. So, if the asset was held longer than a six-months period, then in your computation of the profit from the sale, you computed it on a 50% basis, is that correct?

A. That is correct.

Q. The next column is Corrected Adjusted Gross Income. What does that mean?

A. That is the income before you take out your

(Testimony of Howard H. Whitsett.)

allowable personal deductions, and if you are familiar with income tax returns, the last line on the first page is the same, is where we get to the return.

Q. This is the adjusted income before allowable deductions, is that correct? A. Yes.

Q. Item XIV you have listed Less Allowable Deductions. This item 14 is the one you were going to subtract from item 13, is that correct?

A. Yes.

Q. Under allowable deductions you have about four different items listed there. Explain what each of those is and how you arrive at those [238] figures?

A. The contributions in both years are those claimed on the return of Dr. Lutfy. The interest in '46 is the amount claimed by Dr. Lutfy. The taxes are the same as the amounts on the return.

Q. Those correspond exactly to the returns, is that correct?

A. Yes. The miscellaneous (to allow standard deduction)—on the return of Dr. Lutfy for '47, he had claimed the Lincoln Continental Convertible loss of theft, which I disallowed in that particular year. That brought his allowable deductions below the thousand dollar standard deduction, and this figure is merely a balancing figure to bring it back up and allow the full amount of the standard deduction for that year.

Q. So, in the taxable year of '47 and the year '48, you allowed Dr. Lutfy the standard deduction of \$1,000 on each year, is that correct?

(Testimony of Howard H. Whitsett.)

A. In the year '48 the standard deduction was claimed on the return.

Q. The standard deduction was claimed on the return in that year? A. Yes.

Q. What does this next item mean, Net Income Corrected?

A. That is the corrected gross income less the personal deductions or the standard deductions, whichever is applicable, [239] and is the amount of income upon which the tax is computed.

Q. In other words, that is the difference between this column "corrected adjusted gross income" less any allowable deductions, is that correct?

Q. And the net amount according to your computation was \$12,231.30 in the year '46, is that correct? A. That is right.

Q. And the net income in '47 was \$21,773.47, is that correct? A. That is right.

Q. And the net income in the year '48 was \$28,105.15, is that correct? A. Yes.

Q. And then this next column across here, "net income reported." Does that refer to the returns that were filed? A. That is right.

Q. That is the net income reported on those returns, is that correct? A. That is right.

Q. Then you found the difference which was unreported and you found the difference in the year '47 to be \$7,611.48? A. 1946.

Q. For the year '46? A. That is right.

Q. For the year '47 you found the difference in unreported [240] income to be \$13,719.10?

(Testimony of Howard H. Whitsett.)

A. \$419.

Q. \$13,419.10? A. That is right.

Q. You found the unreported income for the year '48 to be \$9,651.53? A. That is right.

Q. And those items listed across the bottom, that is the amount that the Government now claims that Dr. Lutfy failed to report, the additional amount he failed to report on his return, is that correct?

A. That is correct.

Q. Now, Mr. Whitsett, on the basis of this unreported net income, did you recompute what the Doctor's tax should have been on the basis which we state was the unreported income?

A. Yes, I did.

Q. Is that computation here?

A. The computation is there, yes.

Q. Are these the computations?

A. The other on the white paper.

Q. Are those the computations?

A. That is right.

Q. Can this be marked as one exhibit?

The Clerk: Government's 35 for [241] identification.

Q. These are the computations which you made with respect to the income which you have just testified to from Government's 34, is that correct?

A. That is correct.

Q. There is a part of this exhibit which shouldn't be on here before it is offered, but I will go ahead and offer it and cut that off. Rather than offer this

(Testimony of Howard H. Whitsett.)

exhibit which has some computations on it which shouldn't be on it, let me withdraw this at this time and ask a different question. Mr. Whitsett, did you compute the tax according to the unreported income which the Government has listed on Exhibit 34? A. Yes, I did.

Q. Do you have the totals of those taxes, the total of the tax for each year set down?

A. No, I don't.

Q. Is that on here?

A. Not the totals for three years.

Q. Do you have the tax listed for each year?

A. On that is the only place.

Q. You compute it and set those totals down on these? A. I computed that, yes.

Q. Without offering this exhibit, if I could ask this witness to state what the tax was each year according to the computation taken from 34, that will save having to put this in. I will ask you to testify according to your computations [242] based on Government's Exhibits 33 and 34 what you computed Dr. Lutfy's tax to be for each, '46 through '48?

A. The correct tax liability for Louis P. Lutfy for 1946 is \$1,073.57.

Q. Just tell us as to the total of the tax which was due for each of those years. Was that the total tax? A. That is the total tax due.

Q. For 1946? A. For 1946 for Dr. Lutfy.

Q. How much was it? A. \$1,073.57.

Q. What was the amount due from Bertha Lutfy

(Testimony of Howard H. Whitsett.)

for 1946? A. \$950.07.

Q. That made a total of \$2,023.64?

A. I didn't add it.

Q. For the year 1947 what did you compute that tax to be?

A. Dr. Louis P. Lutfy for the year 1947, the correct tax liability is \$2,471.42.

Q. What was the amount for Bertha Lutfy for that year?

A. Mrs. Bertha Lutfy, the correct tax liability was \$2,309.92.

Q. For the year '48, what was the tax liability for Dr. Lutfy?

A. There was a joint return in '48.

Q. This is both Dr. Lutfy and Bertha Lutfy, is that correct? [243] A. That is correct.

Q. What is the amount of that tax?

A. The correct income tax liability is \$6,362.20.

Q. \$6,362.20? A. Yes.

Q. Referring to the returns for the year 1946, you stated that according to your computation made from Government's Exhibits 33 and 34, you computed Dr. Lutfy's tax to be in the amount of \$1,073.57, is that correct? A. Yes.

Q. What was the amount of tax that was paid according to the return?

A. The tax reported on the return, \$248.88.

Q. You stated that the tax according to your computation for Bertha Lutfy should have been \$950.07; what was the amount reported on the return?

(Testimony of Howard H. Whitsett.)

A. The amount of tax due reported on the return, \$153.88.

Q. For the year 1947 you stated that according to your computation the tax Dr. Lutfy should have paid was \$2,471.42; what was the amount of tax Dr. Lutfy reported on the return for that year?

A. The amount of tax due reported on the return, \$626.03.

Q. According to your computation for the year '47 the tax which Bertha Lutfy stated was \$2,309.92, what was the amount reported on the return? [244]

A. The amount reported due on the return, \$521.53.

Q. For the year '48 computed on the basis of a joint return you stated that the tax which should have been paid was \$6,362.20; what was the amount reported on the return?

A. The amount reported due on the return was \$3,265.36.

Q. Leaving your computations for a few minutes, I want to get into some other matters here. You stated yesterday that you went over Dr. Lutfy's books and records and over his returns on several occasions at his office?

A. That is correct.

Q. You stated that you found some camera equipment. Will you testify just how that camera equipment was shown in his books and records and how it was shown on his returns, if it was?

A. There was camera equipment shown on the returns in the depreciation schedule, if, I believe, \$2,000, and depreciated.

(Testimony of Howard H. Whitsett.)

Q. Were you furnished a depreciation schedule by Dr. Lutfy or is that according to the return?

A. That is according to the return.

Mr. Parker: Are you referring to a particular year? I think these questions and answers should be more specific.

Q. Let me direct your attention—did you find any of this camera equipment on the returns? Can you locate them on there now? [245]

A. On the '48 return there is \$2,000 listed as clinical photo equipment.

Q. On the '48 return?

A. On the '48 return.

Q. How is it listed, photo equipment—and what particular place is it shown on the return?

A. In the depreciation schedule.

Q. The photo equipment is shown in the depreciation schedule? A. Yes.

Mr. Parker: Clinical photo equipment if you want to be accurate. When reading these off, it would be advised, it seems to me, to be accurate. It is listed as clinical photo equipment. It is one thing to say photo equipment and another thing to say what is on the return, photo clinical equipment.

The Court: I believe the witness said photo clinical equipment and then counsel abbreviated it to photo equipment.

Q. Did you examine the Doctor's equipment there at his office in regard to this photo equipment?

A. I saw no photo equipment in his office, no.

(Testimony of Howard H. Whitsett.)

Q. Did you discuss the matter of clinical photo equipment with Dr. Lutfy? A. Yes, I did.

Q. Relate to the best of your recollection what that [246] discussion was?

Mr. Parker: May there be a foundation laid?

Q. Do you recall just where you had this conversation concerning this photo equipment?

A. The first time was in the Doctor's office, and we talked about it several times at the various conferences either in the Doctor's office or Internal Revenue Office.

Q. Do you recall the approximate dates of these conversations?

A. Probably the first one would have been at the original conference in April of 1949.

Q. Do you recall when the other conferences were? A. Not a specific date.

Q. Do you recall approximate dates?

A. Probably in the February or March conferences in '51.

Q. Do you have any notation concerning those particular conferences? A. Yes, sir.

Q. From which you can refresh your recollection. When were these notes made?

A. Notes were taken and I made memorandums of interview immediately after we had the interview with Dr. Lutfy.

Q. They were made after each interview?

A. Yes.

Q. Can you refresh your recollection from your notes and [247] state on which occasions, to the

(Testimony of Howard H. Whitsett.)

best of your recollection, you discussed photo equipment or clinical photo equipment?

A. One conference would have been on March 7th.

Q. 1951? A. '51, yes.

Q. One was the first time you contacted Dr. Lutfy, is that correct?

A. No; that is in '51—yes, the first time.

Q. The first time you contacted Dr. Lutfy?

A. Yes.

Q. In what year was that?

A. That was '49.

Q. Do you recall who was present at those conversations?

A. The first one was just Dr. Lutfy and myself.

Q. Do you recall who was present at the other conversations?

A. Mr. Tucker, Dr. Lutfy and myself.

Q. Relate the best you can remember what the conversations were concerning this camera equipment.

A. I questioned the Doctor on this depreciation claimed on cameras and he gave me the information.

Mr. Parker: May I interrupt? This is not a statement of conversation. This is a statement of the witness' conclusions. He doesn't purport to state the conversation. I wish to move to strike it and he be instructed to relate the [248] conversation if that is what he is asked for.

The Court: Motion denied. In giving the con-

(Testimony of Howard H. Whitsett.)

versation, just tell us as accurately as you can what the Doctor said and what you said.

A. I asked him why the item was listed on his depreciation schedule and he explained that he had a hobby of cameras and he was using those cameras and the camera hobby in taking pictures relating to his medical practice. He stated he would take pictures of skin diseases or various things that he felt would assist him in his medical practice.

Q. You stated that he set this camera equipment up as a business under depreciation for business purposes, is that correct? A. That is right.

Q. What was the amount of this equipment he listed on his 1948 return?

Mr. Parker: That is objected to as having been asked and answered heretofore.

Q. Did you say \$2,000? A. I said \$2,000.

Q. If I might be permitted to return—I forgot what the amount was.

Mr. Parker: I am sure a few other people have. He asked him before and he plainly answered.

The Court: It was asked and answered. [249]

Q. This is the amount here?

A. That is right.

Q. At the time that you were present in the Doctor's office, did you see any other photographic equipment other than the X-ray equipment?

The Court: What do you mean, in '49 or '51?

Q. In '51 during these series of conferences——

(Testimony of Howard H. Whitsett.)

Mr. Parker: Immaterial and irrelevant if he saw any at that time.

Q. Did you see any in '49? A. No.

Mr. Parker: I object as irrelevant. We are concerned with '48.

The Court: The answer in '49 may stand.

Q. You didn't see any of them?

A. Didn't see any in his office, no.

Q. Did Dr. Lutfy show you any records of camera or photographic equipment which were kept in connection with the business?

A. In going over the checks, there were certain checks that were made out to camera supply houses but there was, there may have been one or two invoices, but no complete list of invoices to add up to \$2,000.

Q. I believe you stated that you at one time, you were shown an inventory of the Doctor's medical equipment? [250]

A. That was the inventory from 1941.

Q. That was a prior inventory? A. Yes.

Q. Was this clinical photographic equipment at \$2,000 listed separately from any X-ray equipment?

A. Yes, sir.

Q. Now, in going over these cancelled checks which reflected purchases of photographic equipment, were these particular amounts charged to business expense or how were they charged on the Doctor's records?

A. The checks we show were charged to business expenses.

(Testimony of Howard H. Whitsett.)

Q. You were present when Mrs. Larson, the lady from the camera shop on the Coast, testified there was a camera returned to their company by Dr. Lutfy? A. Yes.

Q. You heard that testimony? A. Yes.

Q. Were you able to find any evidence in the checks or deposit slips of Dr. Lutfy which were in relation to that transaction?

Mr. Parker: That lady testified there was no money involved. As I recall it, there was an exchange of certain equipment. Naturally, he wouldn't find any checks based on her testimony because she said it was an exchange of equipment, various type of photographic equipment, and that in that [251] particular transaction no money was involved. That is my recollection of the testimony. There was another transaction where there had been some three hundred and some odd dollars, and merchandise had been returned and money refunded, \$360.50, and, I believe, she had the cancelled check with her on the stand. That was another transaction. Then she said the only other thing was the exchange of certain equipment where no money was involved.

Mr. Royston: I am referring to \$360.50 item which Mrs. Larson testified about when she produced the cancelled check.

Mr. Parker: What is the question? Will you read the question?

(The last question was read by the reporter.)

Mr. Royston: That is this \$360.50.

(Testimony of Howard H. Whitsett.)

Mr. Parker: It is a double barreled question.

Q. Did you find anything in examining Dr. Lutfy's checks which were in regard to this \$360.50 transaction?

A. Yes. We saw the check and it was charged to drugs and supplies.

Q. Was that the check for Dr. Lutfy in payment of this \$360.50? A. That is right.

Q. It is charged on his records as how?

A. As drugs and supplies. [252]

Mr. Parker: I object to that as having been asked and answered.

The Court: Objection sustained.

Q. In examining Dr. Lutfy's deposit slips, did you find any reference to this \$360.50 refund which Westen's Camera Company made to Dr. Lutfy by check? A. It was listed on his deposit ticket.

Q. Did you ask Dr. Lutfy what that particular item on his deposit slip reflected?

A. Yes. He said that represented a camera that he had returned and got his money back.

Q. After this money was returned, did the Doctor's record reflect it had been removed from the expense item under drugs and supplies?

A. No, sir.

Q. In other words, he still credited it under drugs and supplies as an expense, even though the money had been returned to him?

A. That is right.

Mr. Parker: That is leading and suggestive.

The Court: Don't lead the witness, Mr. Royston.

(Testimony of Howard H. Whitsett.)

The Clerk: Government's 36 for identification.

Q. Mr. Whitsett, I will show you Government's 36 for identification and ask you if you have ever seen the original of those photostatic copies? [253]

A. Yes.

Q. Where did you first see the original?

A. In the Doctor's office.

Q. Were they located in the Doctor's records?

A. The first page in the log book and the others among his expenses listed for '46.

Q. A page was in the log book and a page in the expense listings?

A. Those summary sheets of expense listings that he made his return from.

Q. Did you make these photostats from the original of those documents?

A. They were made from the originals, yes.

Mr. Royston: I will offer 36 for identification into evidence. [254]

* * *

Direct Examination

(Continued)

By Mr. Royston:

Q. I believe the last thing I did with this witness was offer Government's Exhibit 36 for identification into evidence.

Mr. Parker: If your Honor please, we would like to [260] have an opportunity during the lunch hour to examine the original of that document prior to its admission into evidence. We have the original

(Testimony of Howard H. Whitsett.)

but it is not in the courtroom and we would like to examine it.

The Court: Very well.

Mr. Roylston: I have no objection. I will reoffer it later.

Q. (By Mr. Roylston): Now, Mr. Whitsett, I am going to show you Government's Exhibit 27 in evidence which is a photostatic copy and ask you if you ever saw the original of that document?

A. Yes, I have.

Q. Where did you see it?

A. In the Doctor's office.

Q. Did you make this photostat from the original?

A. Yes. We had it made from the original.

Q. Was this furnished to you as part of Dr. Lutfy's records? A. Yes, sir.

Mr. Roylston: I will offer this in evidence at this time, 27 for identification. I don't believe we asked Mrs. Sprague to be excused. May she be excused?

Mr. Parker: No objection.

The Court: She may be excused.

Mr. Parker: If your Honor please, the objection I [261] would like to register to this exhibit is that what is expressed with reference to the depreciation items in relationship to the bill of particulars furnished.

The Court: It may be admitted subject to the motion you made heretofore.

Q. Now, you heard Julia Sprague just testify as to her employment with Dr. Lutfy?

(Testimony of Howard H. Whitsett.)

A. Yes, sir.

Q. Were you able to find in Dr. Lutfy's records any record of payment of salary to Julia Sprague?

A. Yes. On the 1947 year and on one of the pages for cash expenditures, I believe it was December of '47, there was a notation under salaries \$1000, Julia Sprague, or Mrs. Sprague, or Sprague, and I asked the Doctor who that was. He explained that it was the lady that worked at his home.

Q. Did you discuss with Dr. Lutfy at that time whether this salary had been charged as a business expense or a personal expense?

A. Yes. It was charged as a business expense and he contended it was a business expense and it was added in the salaries claimed.

Q. I can't hear you.

A. He contended it was a business expense and it was added in the salary expense that was used as a deduction on the return. [262]

Q. Is that salary expense charged against his practice as a physician? A. Yes.

Q. Now, you heard Hannah Stein, the lady from Rosenzweig's Jewelry Store, testify concerning certain purchases Dr. Lutfy made from Rosenzweig's?

A. Yes.

Q. You heard her testify part of these items were compotes or candy dishes? A. Yes.

Q. Did you find any place in Dr. Lutfy's record where this particular item was listed?

A. Yes. It was charged, the payment to Rosenz-

(Testimony of Howard H. Whitsett.)

weig's was charged as expense in the drugs and supplies.

Q. That was charged under drugs and supplies?

A. Yes. It was charged, the payment to Rosenzweig's was charged to drugs and supplies.

Q. You heard Mrs. Ruppelius from Coles Furnishings in Phoenix testify concerning a Marietta dining room set? A. Yes.

Q. Did you find anywhere in Dr. Lutfy's record where this dining room set was listed?

A. Yes. It was charged under automobile expenses.

Q. Did you ask Dr. Lutfy anything concerning—did you discuss that matter of a check to Coles with Dr. Lutfy? [263]

A. Yes. He said it was the purchase of a gift.

Q. And it was charged out of—

A. Automobile expense.

Q. Mrs. Ruppelius testified that particular dining room set had been returned by Dr. Lutfy and a payment made of a refund of money. Did you find any record where that repayment was deducted from Dr. Lutfy's record? A. No, I didn't.

Q. Was it still carried?

Mr. Parker: Mr. Royston, my recollection of her testimony is it was refunded in '49. He wouldn't find that in the '48 records.

Mr. Royston: I didn't recall that. She had a cancelled check.

Mr. Parker: The cancelled check showed it was '49—I beg your pardon, it was 2-18-48.

(Testimony of Howard H. Whitsett.)

Q. Did you find anywhere in the Doctor's record where he had deducted that amount which was refunded to him? A. No, sir.

Q. You heard the gentleman, I don't recall his name, who testified he was from Dorris-Heyman in Phoenix? A. Yes.

Q. You heard him testify concerning the purchase of a French Provincial table?

A. Yes. [264]

Q. In Dr. Lutfy's record did you discover any record concerning the purchase of that French Provincial table?

A. Yes. The check was deducted as drugs and supplies.

Q. Did you discuss that particular item listed under drugs and supplies with Dr. Lutfy?

A. Yes. He identified it as the purchase of a diathermy couch.

Q. As what? A. Diathermy couch.

Q. Now, concerning the Lincoln automobile. Did you have any discussion with Dr. Lutfy concerning the purchase of that automobile?

A. The one that was stolen?

Q. That Lincoln Continental Convertible.

A. Yes.

Q. Did you ask Dr. Lutfy where he obtained \$5400 and some odd dollars to purchase that automobile?

A. It was written from his bank account.

Mr. Parker: What was the answer to that? Read the question and answer.

(Testimony of Howard H. Whitsett.)

(The last question and answer was read by the reporter.)

Mr. Parker: I move to strike it as not responsive.

The Court: It may be stricken.

Mr. Royston: With the exception of questioning this witness further concerning this document which Mr. Parker [265] wants to examine during the noon hour, I am through with the direct examination, but I would like to reserve the right to question him a little further concerning that one particular document.

Cross-Examination

By Mr. Parker:

Q. I believe you stated you had been with the Internal Revenue Bureau, or the Internal Revenue Service, or whatever it is called, for seventeen years? A. Yes, sir.

Q. Have you been doing the same type of work during the entire seventeen years?

A. Since 1940, fourteen years.

Q. That work is largely auditing then, I take it?

A. Yes.

Q. And testifying in court?

A. Well, that has been a small part of it.

Q. Are you an accountant?

A. Yes. I am a graduate from an accounting university.

Q. What was that?

A. I graduated from an accounting university.

(Testimony of Howard H. Whitsett.)

Q. What university?

A. Benjamin Franklin in Washington, D. C.

Q. Is that a school where you attend in residence or [266] correspondence school?

A. No. I lived in Washington and attended.

Q. How long did your accounting course require?

A. That was a three-year accounting course.

Q. Did you finish the whole three years?

A. Yes, sir.

Q. Are you a Certified Public Accountant?

A. No, sir.

Q. Have you ever been in this or any other state? A. No, sir.

Q. When did you get out of school?

A. 1940.

Q. In 1940? A. Yes.

Q. Were you working already for the Revenue Bureau during your school days?

A. That is right.

Q. Then you continued on with them after you got out of school?

A. That is right, sir.

Q. Since you finished your accounting training you have never been employed by anybody but the Bureau of Internal Revenue?

A. No, sir, that is all.

Q. For the past fourteen years you have been working in [267] the field of auditing tax returns and that sort of thing?

A. That is right, sir.

(Testimony of Howard H. Whitsett.)

Q. Have you appeared frequently in court as a Government witness? A. Just once.

Q. Just one time?

A. Just once previously.

Q. You mean to say this is your second appearance as a witness? A. That is right, sir.

Q. In the whole fourteen years?

A. That is right, sir.

Q. Mr. Whitsett, I notice on this Exhibit 34, the final item at the bottom of the exhibit you have labeled Unreported Net Income. Do you consider that an accurate designation? A. Yes, sir.

Q. For your technical purposes, perhaps, but isn't it a fact that these sums which you have set out opposite the title Unreported Net Income are not, in fact, unreported income?

A. No. I would say they were unreported income.

Q. The fact is, Mr. Whitsett, that what you mean by unreported net income is simply this: that the taxpayer arrived at one conclusion after making the deductions claimed by him as to his net income, and you after exercising your [268] judgment as to what deductions were proper arrived at another figure? A. That is right.

Q. That is what it amounts to, isn't it?

A. That is right.

Q. In other words, it is just a question of a difference in what deductions are taken or allowed, that is primarily what it is, isn't it?

A. Not entirely deductions.

(Testimony of Howard H. Whitsett.)

Q. But it is primarily. Now, I notice here for 1946 Dr. Lutfy reported receipts from his professional business at \$21,947.70, and rents received \$2,325. Then he took certain deductions which you have disallowed and as a result thereof Dr. Lutfy and his accountant come to a different result than you do, and that is what you mean by saying unreported net income. That is primarily what you mean?

A. It wasn't all deductions. There were some additional rents and as I stated, we were unable to establish the exact gross income from the medical practice, so I couldn't say it was all deductions.

Q. His records showed it at \$21,947.70?

A. His log book showed that.

Q. He had a record to substantiate that, his log book showed that?

A. That is right. [269]

Q. His record showed \$2,325 in rent, or did it show more?

A. In two of the years it showed more. I am not sure just which year it showed more. I would have to look at my work papers to see which years his records showed more.

Q. Now, in this particular year, '46 I am talking about, you mention here Capital Gains of \$6,918.55, and I believe you stated that represented two different transactions?

A. That is right.

Q. What two transactions are those?

A. That is the sale of his one-third interest in his property at Moreland and Central he owned in

(Testimony of Howard H. Whitsett.)

conjunction with the Cable Trust, and the vacant lot on Fifth and McDowell.

Q. You treated both of those as short-term transactions? A. I did, yes.

Q. You in your computation decided that it wasn't a long-term transaction and, therefore, one-half of it, a full one-half of it was taxable?

A. The full.

Q. All of it taxable?

A. Yes. If over six months.

Q. All of the gain was fully taxable?

A. Yes.

Q. Then you charged in your computation the full amount of the capital gain on both of those transactions and treated [270] it as ordinary income? A. Yes, that is right.

Q. Subject to the same tax as ordinary income?

A. Yes.

Q. Now, Mr. Whitsett, would you be good enough to admit there is room for debate in respect to that matter, these two transactions?

A. The revenue agent's report is never the final decision.

Q. Then I take it by that answer that it would be subject to some argument?

A. Naturally; they very often are.

Q. Did you ascertain that the Cable Trust Company, or the people owning the other two-thirds interest reported it as a long-term capital gain, did you ascertain that?

(Testimony of Howard H. Whitsett.)

Mr. Royston: I object to that, if he ascertained it.

The Court: This is cross-examination.

Q. Did you ascertain that fact?

A. I am afraid I was unable to because those years have expired and we were not permitted to go into those years from their income tax returns.

Q. If they had expired for the other people why didn't they expire for Dr. Lutfy?

A. We are on a different basis here.

Q. So you never ascertained that fact? [271]

A. No, sir.

Q. In determining, in making your determination that Dr. Lutfy had to pay the full tax on the full amount of the profit on those two real estate transaction, did you have in mind that the escrow instructions for the purchase of this Cable Trust property—and we will refer to that property as being Lot 4, Block 2, Simms Addition—as the Cable Trust property, do you have in mind that the escrow instructions are dated and filed April 4, 1945?

A. Yes, sir, I went through the file.

Q. And the escrow instructions provided for closing on or before July 30, 1945?

A. I saw that, yes, sir.

Q. Did you have in mind the fact that when a title search was made it was disclosed that one of the parties, one of the sellers, was a minor child?

A. That is right.

Q. And that he did not become twenty-one years of age until July 26, 1945?

A. It was about that date, yes.

(Testimony of Howard H. Whitsett.)

Q. And that the deed was held up until he became twenty-one years of age?

A. That is right.

Q. And that the deed itself is dated August 10, 1945?

A. That is right. [272]

Q. Did you also have in mind if in making this determination which you have made, taxing Dr. Lutfy for the full amount of these capital gains, that the Cable Trust Company and Dr. Lutfy took over this property under this transaction and received all of the rents and profits from it on and after June 15, 1945?

A. Yes, sir.

Q. Did you have that in mind, too?

A. Yes, sir.

Q. Yet, notwithstanding those facts, what particular event did you use in your own mind to determine when that property was purchased?

A. In the documents and in the file it was—there was some letter where it was stated that the guardian of this minor felt that rather than go through the trouble of going through the courts to have the property transferred, since the minor would become of age the latter part of July, they would wait until he became of age. I found in looking through the Arizona law that the minor would have a certain period of time after he became of age before he was required or had to agree and complete a transaction. He could go back on the deal that was made by his guardians within a certain period of time after he became of age if he didn't care to go ahead. It was until he made up

(Testimony of Howard H. Whitsett.)

his mind after he became of age. There was a signed document on 10 August that I [273] considered the deal could possibly have been closed without any reservation as to the actual ownership of the property.

Q. Then in your mind the Warranty Deed signed on the 10th of August by the minor child, after having attained the age of majority was, that is the thing you went on?

A. That is right. That was his first act in regard to this property.

Q. You had in mind, of course, that a deposit of \$2500 was made on this property by the purchasers, at least, Mr. Charles Becker for the purchasers, on April 4, 1945, the date on which the escrow instructions were signed? A. Yes, sir.

Q. Did you have in mind also, I believe you stated you had in mind the fact that the purchasers took over and enjoyed the use and benefits of the property from the 15th of June?

A. Yes. The title company apportioned the rents.

Q. In connection with this matter—by the way, I have been referring, ladies and gentlemen, in these questions to this Exhibit 24, the photostatic record of that transaction from the title company in connection with the sale of this property. In arriving at this decision, which you say you arrived at, and on which you based your computation, saddling Dr. Lutfy with the full amount of the capital gain, did you have in mind the escrow instructions for the

(Testimony of Howard H. Whitsett.)

sale of this [274] property was dated December 20, 1954? A. Yes, sir.

Q. And that a contract purchase was entered into by the purchaser, Mr. Stanley J. Mahurin and wife, dated December 20, 1945? A. Yes, sir.

Q. I am referring to escrow, I think the contract is dated the same date?

A. They usually are.

Q. But the escrow instructions provided in this case, the escrow instructions signed the 20th of December, provide here, "hereby parties," the seller and the buyer, "hereby employ Phoenix Title & Trust Company to act as Escrow Agent in connection with a sale by Seller to Buyer upon the following terms and conditions which shall be complied with by said parties"—and the printed form says, "on or before." Here they have x'd out the "on or before" and made, "on or after February 25, 1946."

A. Yes, sir.

Q. You had that in mind? A. Yes, sir.

Q. Would that not indicate to you that it was a part of their deal, that this sale was not to be made or consummated until after February 25, 1946?

A. That is possible. [275]

Q. You have had enough experience in income tax matters to know it is nothing illegal about a taxpayer setting up a real estate transaction so that it becomes a long-term rather than a short-term capital gain? A. Yes, sir.

Q. There is nothing illegal about that. It is per-

(Testimony of Howard H. Whitsett.)

fectly lawful, and as a matter of fact, it is done with considerable frequency, is it not?

A. But the deal was completed in December, payments made; or completed by the title company.

The Court: At this time we will recess until 2:00 o'clock this afternoon.

(Noon recess.) [276]

September 10, 1954—2:00 P.M.

HOWARD WHITSETT

resumed the witness stand.

Cross-Examination

By Mr. Parker:

Q. Mr. Whitsett, continuing the line of inquiry which I was pursuing before the noon recess in connection with this Cable Trust transaction and inquiring into the considerations which you had in mind with respect to your determination to compute the tax on behalf of the full amount of the capital gain, I will ask you if you had in mind that this agreement for the sale of real estate, dated at the top of such agreement on the 20th day of December, 1945, the same day as the escrow instructions, wasn't executed by the purchaser until January 18, 1946, and not executed by the seller, Mr. Eisele, for the seller until January 21, 1946, were you aware of those facts? A. In the sale of it?

Q. Yes, the contract of sale.

(Testimony of Howard H. Whitsett.)

A. That is right.

Q. Now, did you ascertain in connection with your investigation of this transaction that due to the fact that the Cable Trust Company, and assisting Mr. Decker and Mr. Eisele and the defendant, Dr. Lutfy, took over the property though on June 15, 1945, and taxes were prorated to that date in connection with the settlement of this transaction to purchase, that the title [277] company determined that the date of purchase was June 15, 1945, and so advised the parties. Were you aware that that determination had been made and that advice given to the parties by the Phoenix Title and Trust Company?

A. I talked to one of the officers of the Phoenix Title and Trust, they said they made no determinations in any case, that wasn't for them to decide. It was the agreement of the parties the rents were to start as of June 1 and they apportioned the rents and taxes, whatever it was, according to those dates. But the sellers, in view of the fact the sellers could not give clear title until this minor became of age I couldn't say the property actually changed hands and the title was transferred until such time.

Q. When the purchasers started receiving the income and paying the taxes on the property that meant nothing to you?

A. It wasn't conclusive, the date of sale.

Q. Not in your mind?

A. Not in my mind, no, sir.

(Testimony of Howard H. Whitsett.)

Q. Did you talk to someone at the title company, do you remember who you talked to?

A. I believe it was Mr. Rhoads.

Q. And he is head of the escrow department?

A. That is right.

Q. And he was not the gentleman who handled this escrow?

A. No. I was asking his opinion on the dates of sale of [278] the property and as to whether or not they would hold and he said they did not make such determinations.

Q. Mr. Rhoads didn't make such a determination?

A. He said the title company does not make such a determination.

Q. The title company is a corporation, it can act only through its employees? A. Yes.

Mr. Royston: I object to that as argumentative.

The Court: It is argumentative.

Q. (By Mr. Parker): Mr. Whitsett, you didn't talk to Mr. W. J. Ladyman, the officer who handled the transaction, did you?

A. No, I don't believe I did.

Q. Now, with reference to this other transaction which enters into this sum of \$6918.55 upon which full amount you computed tax, did you examine the escrow papers and the deed which are in evidence here as Government's Exhibits 20 and 23?

A. Yes, sir.

Q. In making your determination of that matter? A. Yes, sir, I did.

(Testimony of Howard H. Whitsett.)

Q. Now, did you observe and bear in mind in making the determination which you did make that this was a short-term capital gain rather than a long-term which would be where the property is held six months or more—I think we have [279] neglected to define to the jury what we are talking about in “short-term” and “long-term capital gains.” Any property held six months or more by the owner before selling is referred to as a long-term capital gain? A. That is right.

Q. If the deal is made, the sale is made in less than six months it is referred to as a short-term capital gain? A. That is right.

Q. Now, in the sale of that property I asked you if in your investigation of it if you had in mind the letter of Mr. Guy Fisher, the real estate broker, dated March 18th, 1946, wherein he advised the Arizona Title Company that this deal is to be closed on or about March 25th, 1946?

A. Yes, I saw that.

Q. You saw that? A. Yes.

Q. You also saw these other papers in connection with the transaction, including the escrow agreement; and did you observe the check that was made by the Title Company, Arizona Title Guarantee and Trust Company to Louis P. and Bertha A. Lutfy, in the amount of \$6250.72, dated March 26, 1945?

A. Yes, I saw that check. I also saw the check from the purchaser on February 11th for the balance of the purchase price.

(Testimony of Howard H. Whitsett.)

Q. Payable to whom? [280]

A. To the title company.

Q. Payable to the title company.

A. And I believe on this statement the taxes are prorated as to March 1st, if that is a determining factor.

Q. I didn't say it was. A. Well——

Q. You said it wasn't just a moment ago.

A. I am just drawing your attention to the fact the taxes on this statement are prorated to March 1st. But the entire deal was consummated by the time the money was all paid in.

Q. I mean that is in your opinion?

A. In my opinion.

Q. That is a legal matter, is it not?

A. It just laid there for about a month before anything further was done to it.

Q. I understood you said that was perfectly all right and people did make real estate transactions whereby the transaction was not closed or to use your term, consummated, until after the six-month period had gone by?

A. In that respect I talked to one of the men at the Arizona Title Company and asked them——

Q. Well now, you are not going to give us hearsay testimony?

A. No. I spoke to one of the men—I can't tell you what [281] his name was—however, one of the officers; asked him if parties to a transaction came in with—entered into an escrow agreement and

(Testimony of Howard H. Whitsett.)

said, "We don't want this deal to go through for so many months"——

Q. Pardon me for interrupting, Mr. Whitsett. I feel that is hearsay testimony and not responsive to my question I asked you. As to the Phoenix Title and Trust Company I asked you a question I think justified the answer; I haven't asked you such a question as to this transaction, therefore I don't think I would want hearsay on that as to what he may have said about it. Now, you observed the deed which is Government's Exhibit 20 in evidence by which Louis P. Lutfy and his wife conveyed this property to Philip Lantin and his wife, and that this deed, although it bears date of January 12, 1946, was recorded on March 27, 1946, at 9:00 a.m. at the request of the Arizona Title Guarantee and Trust Company. You were aware of that at the time? A. Yes, sir.

Q. Mr. Whitsett, do you have a copy of this Exhibit 34? A. Not right now.

Miss Reimann: Is that 34?

Mr. Parker: Could he have that? In the following year, 1947, this item of \$2,363.16 listed here as a capital gain, what is that?

A. I forget just which car that was the Doctor sold. He [282] bought it in December and sold it in January, was a matter of almost days. It was reported that way on his return.

Q. So you had nothing to do with that determination? A. No, sir.

(Testimony of Howard H. Whitsett.)

Q. It was correctly, in your opinion correctly reported on the return?

A. That is right. His check and his receipt I believe also back up those same dates.

Q. Now, the \$941.82 for 1948, I understood you to say one-half of the capital gain on a real estate transaction which you determined to be a long term?

A. That was the sale of his home.

Q. The sale of a home. Mr. Whitsett, I would like to ask you preliminarily if you did not furnish to the United States Attorney certain information upon which he predicated a bill of particulars or at least a reply to a motion for further particulars, in which the information is furnished to us that the amount claimed as a deduction resulting from the theft of the Lincoln automobile in 1947 has been disallowed in part. Did you not furnish the United States Attorney that information?

A. I don't believe I did, no.

Q. Did some of your associates to your knowledge?

A. I believe whatever figure was arrived at was taken from the files in the Court in Phoenix, but I didn't even see [283] the file.

Q. As I understand it here, in your own determination, referring to paragraph, Roman numeral XI here, and the year 1947, and this car which was stolen in that year, you have disallowed in your own determination completely the cost of that car?

A. That is right, sir, he had a claim——

Q. And you have by so disallowing it you have

(Testimony of Howard H. Whitsett.)

added that to the column entitled "living expenses for 1947." A. That is right, sir.

Q. Thus adding \$5,420 to that total for that year? A. That is right, sir.

Q. Now, Mr. Whitsett, do you know or have any way of ascertaining who furnished the United States Attorney with the information which I read to you from this bill of particulars, saying that the deduction resulting from the theft of the Lincoln automobile in 1947 had been disallowed in part?

Mr. Royston: I object to this because the figure to which they have been testifying on Exhibit 34 is stipulated to. That figure is stipulated to between counsel. Now, if they are trying to show a discrepancy some place it is a matter stipulated to.

Mr. Parker: It is stipulated as to the cost of the Cadillac.

The Court: Objection overruled. Go ahead. [284]

Q. (By Mr. Parker): Could you answer that last question?

A. I had nothing to do with the drawing of this. However, the Doctor claimed more than the \$5400, if that is what you mean.

Q. Yes. He claims some expenses he incurred——

A. \$6700, something like that.

Q. Trying to get the car back, 'phone calls, and so forth, he originally claimed over \$6,000?

A. Yes, \$6700, I think.

Q. Now, in your investigation of the matter of this stolen car you learned, did you not, that the car was stolen that year, the year that is indicated

(Testimony of Howard H. Whitsett.)

here, and that the insurance company carrying the fire and theft and comprehensive insurance on it refused to pay the claim for the loss of the car?

A. That is right.

Q. And you also learned in your investigation that Dr. Lutfy had to sue the insurance company and carry the case all the way to the United States Court of Appeals at San Francisco before he got a judgment for his loss?

A. I don't remember at the time whether he had gone that far, but I know he had to sue.

Q. And that he did get a judgment at the hands of the Court for——

A. Oh, yes. [285]

Q. ——for the amount of his loss of the car?

A. Yes.

Q. That when he collected that judgment in years later than 1948 he reported that, the net on that, as income. Did you learn that?

A. At the time I made the investigation he hadn't received the money and he was, he felt quite positive he would and I informed him that the loss was not deductible in the year of the loss since he had a claim; and when he received the money any loss between the amount of money he received and that he had spent would be deductible in that year and to not report the income. What he did on the matter I do not know.

Q. Deducting it as a loss in the year when it was lost and reporting it as income in the year in which the judgment was paid results in no evasion

(Testimony of Howard H. Whitsett.)

of taxes or any deception of the Government in any way, does it?

A. I haven't alleged evasion on this item that I know of.

Q. Well, I am reassured to have you admit that so far as you see it there was no evasion in there. Now, Mr. Whitsett, you previously stated that you and Mr. Tucker worked on this case in the investigation of it, preparation of it. Did any other employee of the Government work with you or in association with you in the investigation and preparation of the case?

A. Not materially. There may have been some assistants on [286] one or two items of some type.

Q. I am referring to Mr. Cass, the regional attorney from Los Angeles. A. Yes.

Q. He took quite a hand in it, did he not?

A. Yes, sir.

Q. Came to Phoenix twice, at least twice?

A. Three times, I think.

Q. Three times. The last time he came in the latter part——

Mr. Royston: I fail to see any relevancy.

Mr. Parker: This is preliminary, your Honor. I propose to show——

The Court: I will treat it as preliminary and let you proceed.

Q. (By Mr. Parker): ——came to Phoenix the last time in the latter part of May and stayed until about June 6th or 7th, somewhere along there, of this year? A. Something like that, yes, sir.

(Testimony of Howard H. Whitsett.)

Q. During that time you and Mr. Tucker and your regional counsel, Mr. Cass, were in conference with me a time or two, were in conference with Mr. Moser here, the accountant who at that time had most of Dr. Lutfy's records, and you spent quite a bit of time with Mr. Moser, did you not?

A. Several hours, yes.

Q. You are aware that Mr. Cass did utilize the investigation material which you and Mr. Tucker had developed for him? [287]

A. Yes, he was preparing to try the case.

Q. You were doing what we would refer to as the leg work and he was assembling the information and preparing the case?

A. I suppose you would phrase it that way, yes.

Q. In the course of that preparation and from the material which you furnished him, Mr. Cass prepared quite a lot of proposed stipulations which were submitted to me by the Government as in the role of attorney for the defendant?

A. Are you speaking of the first list of——

Q. Yes, sir. I am speaking of the original proposals. There were about three or four installments of them.

A. I did not assist in those.

Q. You knew he had prepared them from the data furnished him by you and Mr. Tucker, did you not?

A. Yes, they would have to be prepared from that.

Q. Are you aware that one of these proposals——

(Testimony of Howard H. Whitsett.)

Mr. Royston: I object to reading this unless it is a stipulation, because all this background stuff is completely hearsay and I don't know a thing about it.

The Court: This stipulation was never entered into?

Mr. Parker: Yes. They proposed it and we signed it.

The Court: It was never signed by both sides?

Mr. Parker: It was never signed by both sides——

Mr. Royston: There was a lot of this hassling went on I wasn't in on. [288]

The Court: I will sustain the objection.

Q. (By Mr. Parker): Mr. Whitsett, I will ask you this: Did you not at one time during the course of this investigation arrive at quite a different set of figures for living expenses during these three years than those which you have now submitted on Exhibit 34?

A. We have eliminated a great many items that could be argumentative and have just the, almost most of them are the ones you and the counsel have stipulated to with a few exceptions, is all we have put in.

Q. I will put it this way: I think you misunderstand my question. I will ask you whether or not a matter of some approximately five or six months ago your figures for the living expenses paid by check for the year 1946 was \$3,838.67, whereas you now submit a figure of \$4,683.09, is that not true?

(Testimony of Howard H. Whitsett.)

A. Again I will have to say that was made up in Los Angeles by Mr. Cass and his technical assistant over there. I did not assist in the preparation of the figure.

Q. I understood you to say you and Mr. Tucker furnished him with the data——

Mr. Royston: I think this is highly improper, the fact Mr. Parker and Mr. Cass couldn't agree on stipulations has nothing to do with the testimony of this witness.

The Court: He asked this witness if he did not within the past five or six months arrive at a certain figure. The [289] witness has testified that he didn't. The question was asked and was entirely proper. It has nothing to do with the stipulation, it was what this man arrived at.

Q. (By Mr. Parker): I will ask you, Mr. Whitsett, if it isn't a fact that five or six months ago, approximately, you had arrived at a figure for the living expenses of the defendant and his family paid by checks for the year 1947 in the sum of \$5,337.72, whereas you now submit a figure on your Exhibit 34 of \$6,967.72, is that not true?

A. No, sir. Again that is the figure compiled in Los Angeles.

Q. Did you compile figures covering living expenses by checks approximately six months ago or prior thereto? A. No, sir.

Q. You never did? A. No, sir.

Q. During the investigation of this case you never compiled any figures?

(Testimony of Howard H. Whitsett.)

A. Well, our investigation was three years ago. I compiled for my technical report and expenses listed in that, they are greatly in excess of either of these figures.

Q. Greatly in excess of either of those figures?

A. That is right. They picked out certain ones they wanted to ask you to stipulate to, is all.

Q. Did you furnish the figures? [290]

A. They took off of my working papers in Los Angeles, but what they took off I don't know.

Q. I will ask you if you did not five or six months ago have on your working papers a figure for living expenses for the defendant and his family for 1948 \$5,222.63 as opposed to \$5,660.61 on your Exhibit 34?

A. Again I will say that was compiled in Los Angeles at the same time the other papers were.

Q. You say you were not present over there at any time? A. No, sir.

Q. You never went over there with Mr. Cass?

A. No, sir.

Q. He took your working papers?

A. That is correct.

Q. Took them with him to California to compile these various figures?

A. That is correct, sir.

Q. Then you say originally you had a figure much larger than either of the figures I have suggested or figures contained in your Exhibit 34?

A. On my technical report the figures on all three years are much larger.

(Testimony of Howard H. Whitsett.)

Q. I take it it is true that what figure you come up with depends somewhat on who does the figuring?

A. It depends on how much of it they want to bring into [291] Court.

Q. Now, Mr. Whitsett, the living expenses under the subtitle B here, cash, those you have marked "estimated" and therefore I take it that there is no exact information on that?

A. Those are the Doctor's estimates.

Q. Those were the Doctor's estimates. And the same figure for each of the years 1947 and 1948?

A. That is correct.

Q. Now, Mr. Whitsett, did Dr. Lutfy during this examination tell you that he purchased most of his groceries in cash?

A. There were no checks outside of perhaps one or two to indicate that there was any groceries purchased and he agreed they must have been purchased by cash.

Q. Now, did he tell you that he had relatives or close friends who were in the grocery business?

A. Yes, he did.

Q. And that he bought his groceries in wholesale quantities, at least at wholesale prices?

A. Yes, sir.

Q. By the way, Mr. Whitsett, in arriving at the computations contained in your Exhibit 34, as well as the computations contained in your Exhibit 33, the so-called net worth statement, I will ask you if you made any allowance at all in any of the three

(Testimony of Howard H. Whitsett.)

years herein involved for cash gifts from [292] Mrs. Linsenmeyer, the grandmother of the Lutfy children, the mother of Mrs. Lutfy?

A. I believe on March 16th when Mr. Tucker and Mr. Racey and I and the Doctor——

Mr. Royston: I am sorry, I can't hear you.

Mr. Parker: Pardon me, Mr. Whitsett, you could answer that readily yes or no. I might have a further question or if you have something to explain I am sure the Court would agree your counsel can ask you about it. I just said did you make an allowance for any cash gifts or benefices from Mrs. Linsenmeyer to the Doctor and family or wife and family?

A. No, I didn't, because he said there were none.

Q. Because he said there were none?

A. That is right.

Q. Now, did you make any allowance in your computation of either of these two exhibits for the sale by Mrs. Lutfy of her piano in 1947 for the sum of \$475, which was paid in cash?

A. This is the first I have heard of the sale.

Q. This is the first you have heard? Then I take it you did not make any such allowance. Now, did you make any allowance in the computation of either Exhibits 33 or 34 of a loan made to Dr. Lutfy in the general vicinity of September 18, 1947, by Mrs. Linsenmeyer in the sum of either \$3200 or \$3500, and which has never been repaid? [293]

A. No, because I asked the doctor if there were any other loans and he said that was all.

(Testimony of Howard H. Whitsett.)

Q. Now, to clarify this matter a little bit. I understood you to say unequivocally that Dr. Lutfy paid for this Lincoln automobile by check out of his personal bank account?

A. I would have to look at the record, my work papers, to see whether he did or didn't.

Q. I understood you to say awhile ago when Mr. Roylston questioned you specifically on that point that it was paid by his check?

A. I believe it was paid by check, I don't know.

Q. Would it refresh your recollection any if I suggested to you that although a check was at one time issued the check was never honored and never paid out of Dr. Lutfy's account; and that this car was purchased in cash?

A. Are you speaking of the car that was stolen or the car that he attempted to buy in Tucson?

Q. I think it was the car he attempted to buy in Tucson. I may be confused about the two cars. The same car that was stolen?

A. The doctor explained both transactions.

Q. By "both transactions" which is the other transaction you are referring to?

A. The doctor had been looking for a—I don't know whether they were both Lincolns or not—and he heard of one [294] here in Tucson and in some manner or other the deal was all consummated within one year so it did not effect the net worth and I can't give you too direct a story on it because I didn't have to remember the details. But a check was put through the bank here in Tucson, the doc-

(Testimony of Howard H. Whitsett.)

tor's check, which he was to cover in Phoenix if the car was delivered. I don't know whether it was a postdated check or something of that nature, and this bank called the bank in Phoenix. I think the amount was \$5505. They called up and asked if there was 5505 in his bank account and they said "Yes," thinking it was \$55.05; told the bank to honor the check and then the bank forced him I believe to pay that money then. I don't know whether he actually went to suit for it, Court for it, or not, but the bank refunded the money to him. That deal and the other deal were within practically the same time. So just what happened to each one I am a little vague on.

Q. I am advised this was only one deal, but be that as it may.

A. That might be too, I don't know.

Q. That check you know was never paid out of his bank account, don't you? A. That is right.

Q. And you know or did you ascertain in your investigation that in connection with this matter he had borrowed either \$3200 or \$3500 in cash from Mrs. Linsenmeyer? [295]

A. Not at the time of the investigation. I heard something about it—as to who told me or where I heard it since then I couldn't say, but at the time of the investigation I knew nothing of that loan.

Q. And did you not ascertain either at that time or later that simultaneously or about the same time and for the same purpose he had borrowed the \$3500 from Mrs. Linsenmeyer he borrowed \$1,000 from his cousin, Eddie Basha, of Chandler, the grocer?

(Testimony of Howard H. Whitsett.)

A. We saw the receipt in the bank for \$1,000 from Bashas and we questioned him about that and he said he didn't remember whether he had loaned his cousin the \$1,000 and that was where he paid it back or that was where he borrowed it, and he was uncertain as to what that situation was. He said, "We don't owe anything to each other," and it was settled soon after that as far as we knew anything about. So at the end of the year as far as were ever given any information effecting the final net worth.

Q. Yes. I am not suggesting that Eddie Basha was not repaid, he was. But Mrs. Linsenmeyer was never repaid her \$3,500 and you say you did hear that later on?

A. I have heard that since then, but where I don't know.

Q. Now, Mr. Whitsett, did you learn in the course of your investigation of the affairs of Dr. Lutfy that in 1944 his mother repaid to him money which she had previously borrowed [296] in the sum of \$4400?

A. Yes, sir.

Q. Mr. Whitsett, is it not true that in computing the figures here on this Exhibit 34 you resolved all doubts against the taxpayer and eliminated most of the deductions which he had claimed in his return?

A. Deductions have no bearing whatsoever in a net worth case.

Q. I am referring to Exhibit 34, the computation of the tax.

A. The only place deductions would figure in this is whether or not it was a personal item or business

(Testimony of Howard H. Whitsett.)

item; and the only ones we took were the personal items.

Q. You of course, do you mean to say that you could go over a man's records for the year, say the Judge's records, and his cancelled checks and unerringly tell which were personal items and which business items if he were in a business or profession?

A. If the Judge were there and identified them as to what they were for I could.

Q. You think you could then? A. Yes, sir.

Q. You could determine of course if it bought gifts at Christmas time for his clients or patients, you would have no difficulty determining if those were personal or in connection [297] with business or profession?

A. Those would be questionable by either side.

Q. Questionable by either side. Then you do admit there is an area where they would be questionable, I mean debatable or at least susceptible to more than one interpretation?

A. Any deduction is necessary or can be insisted that some form of proof other than the just the payment would be produced.

Q. Now, I take it that in computing this Exhibit 34 you probably disallowed in your own mind and for the purpose of your computation all expenditures in connection with his office which you considered to be capital investments, did you not?

A. I capitalized a few of the items, yes, sir. They were very small ones.

(Testimony of Howard H. Whitsett.)

Q. Is it not true that it is a practice fairly common in the field of income tax and accounting that some firms will capitalize and enter into their capital account, oh, the purchase of a dozen pencils or wastebasket, whereas others follow a practice of not capitalizing an expenditure unless it is \$50 or \$100 or some other established sum, even \$500 in some instances?

A. It depends entirely on the use of that article whether it is of a capital nature.

Q. Well, the question I am asking you is it not a standard practice commonly in use among business firms, for instance, to [298] have some established standard in terms of cost at and above which they capitalize the purchase, and below which they charge to expenses? A. Not necessarily, no, sir.

Q. You say not necessarily. I didn't say necessarily.

A. Well, from my experience as a revenue agent that hasn't been a consistent policy. Occasionally you will find and you check it just the same as anyone else.

Q. I want to ask you, Mr. Whitsett, inasmuch as you made some point of a bank account in Mrs. Lutfy's name by her nickname, of course, at the Bank of Douglas of \$3,020 savings and a checking account of \$437.85 at the end of the year 1945——

A. I am sorry, I was getting the Exhibit.

Q. I am referring to item five among the checking accounts and item three among the savings ac-

(Testimony of Howard H. Whitsett.)

counts for the year ending 12/31/45. A. Yes.

Q. I want to ask you if in your investigation of this matter you learned or discovered that in 1945 Mrs. Lutfy had sold a diamond ring to a friend for \$3,500 and that she deposited this money in the Bank of Douglas in these two accounts?

A. That is the account we didn't find until last year.

Q. I beg your pardon. I move to strike it as not being responsive to the question, your Honor.

The Court: Read the witness the question. [299]

(The last question was read.)

The Court: You can answer that yes or no.

A. No, I didn't find that. I wasn't investigating it.

Q. (By Mr. Parker): Your investigation then was not at that time concerned specifically with the proceeds of the sale of property, you were looking for a taxable income, were you not?

A. We only set up the ending balance of that year. You say this was in '45?

Q. Yes, sir.

A. There was just \$437.85 left in the account, in that one account, and \$3,000 in the other one.

Q. Yes.

A. We put in the ending balances which in effect reduced the income for 1946.

Q. Mr. Whitsett, the point really of my question, to be perfectly frank about it, you had insinuated, at least I thought, in your testimony in chief, I thought you were insinuating to this Jury that Dr.

(Testimony of Howard H. Whitsett.)

Lutfy in answering the questions originally put to him about bank accounts, about his bank accounts, I understand that you asked him, that you were insinuating he was trying to conceal this bank account or these two bank accounts of his wife. And I am just simply suggesting to you or asking you if you didn't discover at some later time at least the nature of these two bank accounts in his wife's [300] name and where the money came from that went into them?

A. No, sir. We only took the balances at the end of that year. We did not go into the prior year and determine the sources of the funds.

Q. Then at the time you made this investigation you were not interested in the source of funds which he had in his year-end bank balances?

A. Not at the beginning of that period.

Q. Yes. Then I take it if that statement be true you would not want to suggest to the Jury that Dr. Lutfy had concealed anything from you in which you at that time had any particular interest?

A. Well, I don't know whether he knew about the bank account or not.

Q. Mr. Whitsett, do you recollect a conversation with Dr. Lutfy at his office probably in January or February of 1950 in the presence of Mr. Tucker?

A. It would be 1951, I think.

Q. 1951, I beg your pardon, at which there was a conversation about whether or not Dr. Lutfy should charge off to professional expense the telephone at his home. Do you remember? You can an-

(Testimony of Howard H. Whitsett.)

swer yes or no if you remember such a conversation?

A. Yes, sir, there was a conversation as to the telephone expense.

Q. He had told you at that time since he got a great many [301] of his professional calls on his home 'phone and that they outnumbered his social calls he felt he should be able to charge that 'phone to his professional expense?

A. That was never added to his personal expenditures at all. We did not add it to his personal expenditures.

Q. You did not? A. No.

Q. My question was didn't he tell you at that time he felt that was a proper——

A. Yes, his argument was it was more professional than personal.

Q. Mr. Whitsett, I don't mean to offend you or embarrass you, but I wish to ask you this question. Did you not at that time and place and in the course of that conversation say to Dr. Lutfy, in substance: "You doctors are getting away with murder. I am going to take away all your deductions and let you fight to try to get them back." Did you not make that statement in substance, in substance that statement? I wouldn't say they were the exact words, but in substance make that statement to Dr. Lutfy at that time in the course of that conversation?

A. I couldn't affirm or deny that, but I don't remember.

(Testimony of Howard H. Whitsett.)

Q. You don't remember? A. No, sir.

Q. Now, Mr. Whitsett, I believe that you discussed— [302] maybe there is an error in recalling this—that you discussed with Dr. Lutfy the matter of Mrs. Julia Sprague compensation and how it should be handled or charged?

A. Yes, I discussed that on my first visit with him.

Q. Did he not tell you in substance as follows: That one of her principal functions was to answer the telephone at night when he and his wife were away, or other times when patients might call at the house, did he not tell you that?

A. That was what he said, yes, sir.

Q. That is all I am asking you, just what he said. Did he not tell you that she also did some housework and some baby sitting? A. Yes, sir.

Q. And he did not tell you that the compensation which he was paying her was of two categories, that he was paying her \$20 a week, whatever it was, in cash and on the other hand that he was furnishing her with room and board?

A. Yes, he was furnishing room and board part of the time, I believe.

Q. Did he not also tell you that he felt that her services for answering the telephone on calls of his patients when nobody else was there to take such calls was of the value of approximately \$20 a week, the amount he was paying her in cash, and that he felt that the work she was doing as a domestic was of a

(Testimony of Howard H. Whitsett.)

value approximating the room and board which he [303] was furnishing her?

A. I don't think we went into it as completely as that. He said that part of the time she lived—for a short time she lived at the house, the rest of the time she had a home of her own and they called her as a baby sitter. She wasn't in residence, she did use the address as a mailing address and I don't know at that time whether she was, but not all the time was she in residence at his home.

The Court: At this time, Members of the Jury, we will take the afternoon recess.

(Recess.)

Q. (By Mr. Parker): Mr. Whitsett, just a few more matters. I will ask you whether or not in the course of your investigation of Dr. Lutfy's affairs you discussed with him the matter of this Phoenix Sports Shop about which you, I think, testified concerning some stationery?

A. Yes, we discussed that.

Q. Did he not tell you that shortly after coming back from the army that he had intended to open a sports shop in Phoenix, did he not tell you that?

A. I don't remember that at all, no, sir.

Q. Did he not tell you that with that intention in mind he had had this stationery or letterheads printed? A. No, I don't remember that.

Q. Did he not tell you that he discovered that he could [304] not at that time get the necessary mer-

(Testimony of Howard H. Whitsett.)

chandise and therefore he never opened such a business and for that reason?

A. No, sir, I don't remember him intending to open a business to the public, which I presume you mean.

Q. Yes. A. At all, no, sir.

Q. Did he not tell you he had deposited \$500 in a bank account in the name of the Phoenix Sports Shop at the time he was planning to open such a shop?

A. There was an opening, I believe an opening deposit of \$500 but I didn't know the reason.

Q. Did he not tell you and did you not ascertain it to be a fact that over a three-year period this bank account had gradually been depleted from \$500 to \$35.65? A. It went down.

Q. And that was through purchases for his own use?

A. I don't remember the exact action in the account right now. I would have to see the account to testify to that.

Q. You have seen the account, have you not?

A. Oh, yes.

Q. And do you not recollect there were never any deposits made in it during this three-year period or more?

A. No, I couldn't testify to that right now. I would have to see the account.

Q. Do you have a transcript of the account with you? [305] A. There might be one.

(Testimony of Howard H. Whitsett.)

Q. I wonder if you would consult your records and see if you don't have that information.

Mr. Whitsett, what do you hold in your hand now?

A. A transcript of the bank account of the Phoenix Sport Shop from the Bank of Douglas.

Q. Was that made by yourself?

A. No, sir, I am afraid this is in Mr. Tucker's handwriting. I have been present, however.

Q. You were present? A. Yes, sir.

Q. In what manner do you make the transcript?

A. This is a copy of the dates, the deposits with notes.

Q. What period does that cover?

A. It was opened on December 18, 1945, and closed October 27, 1949.

Q. Were there some few deposits?

A. Yes, there was a deposit on September 9, 1947, of \$100; on December 10, 1947, of \$300; on October 25, 1948, of \$150 and April 18th, 1949, of \$300.

Mr. Parker: I wonder if we might have that marked for identification.

(Defendant's Exhibit B marked for identification.)

Q. (By Mr. Parker): Did Dr. Lutfy tell you he was fond of hunting and did quite a bit of it himself? [306]

A. Yes, it appeared to be one of his hobbies.

Q. Did he tell you that upon learning that he

(Testimony of Howard H. Whitsett.)

couldn't, that it wasn't feasible to open a sporting goods store in Phoenix, that he had kept this firm name because he was able to buy guns and equipment for himself at wholesale by reason of having these letterheads?

A. Yes, that was an advantage that he enjoyed with that.

Q. Did he tell you that he had used this account for his own private benefit in that manner as contrasted to entering into any commercial business of buying and selling such items?

A. He said he used it for himself and bought things for other people, friends, and so forth.

Q. He not only could get for himself at wholesale but also accommodate his friends who might want a gun or some sporting equipment by getting it for them at wholesale?

A. That is right. That was his explanation, yes, sir.

Q. Did he tell you when he did so that they simply paid whatever it cost, that he made no profit on those transactions?

A. That was his explanation, yes, sir.

Q. Where he accommodated a friend that way. Now, so much for that. Mr. Whitsett, I believe you stated in your testimony in chief that you had never seen any photographic equipment in Dr. Lutfy's office?

A. I don't believe I ever saw any at the office, no, sir.

(Testimony of Howard H. Whitsett.)

Q. Are you reasonably sure of your testimony in that [307] respect?

A. I have seen some of his photographic equipment but I don't believe it was at the office.

Q. You don't think it was at the office. Where do you think it was?

A. He brought it up to my office.

Q. Whereabouts?

A. At the time it was in the Security Building.

Q. Do you remember, Mr. Whitsett, when you first started to work on this case in '49 you went to Dr. Lutfy's office from time to time to work on his books and records, do you remember that?

A. I was there twice.

Q. Do you recall that you asked Dr. Lutfy where you could work, if he had a place where you could work there at the office?

A. Yes.

Q. And he told you that he did and took you into a room in which there was a rather large table, something on the order of one of these tables except perhaps longer?

A. Yes, it almost was the length of the end of the room.

Q. A table about three feet or so wide and about twelve feet long, almost the length of the room?

A. Probably, yes, sir.

Q. Do you remember in order to make a place for you to do [308] your work there that he had to move some photographic equipment that he had there on that table?

A. He could have moved something or cleared

(Testimony of Howard H. Whitsett.)

away something. I don't remember it was actually photographic equipment or just what it was. I am not a photographic fan and don't recognize all of the things of that nature.

Q. You mean to say now you might have seen photographic equipment but not being advised of those matters you might not have recognized it when you saw it, is that what you mean to say?

A. That is very possible.

Q. I would like to ask you specifically if you do not remember that among the photographic equipment on that table where he took you to do this work was also an enlarging device or enlarger, do you remember that?

A. If I saw it I probably connected it with his x-ray.

Q. Do you recollect there were trays there, some three trays designed to hold solution that were moved aside so that you could sit at that table and have room to do your work?

A. No, I wouldn't remember any specific trays.

Q. Do you remember seeing there a device for the printing of photographs?

A. Not there. He showed me his room where, as far as the x-ray room and all that, there could have been all that stuff in there, too.

Q. I am not referring to the x-ray equipment. I am [309] referring to the photographic other than x-ray. You don't recall seeing any equipment for printing of photographs?

A. I wouldn't probably recognize it if I saw it.

(Testimony of Howard H. Whitsett.)

Q. I see. Then you can't be at all sure then, can you, Mr. Whitsett, in your statement that you made to the Jury and your testimony in chief that you saw at no time any photographic equipment in Dr. Lutfy's office?

A. The only time I remembered seeing any was when he brought the equipment to show some pictures at the office.

Q. Then you wish to qualify your testimony at this time by saying you might have seen something in the office, but you possibly didn't recognize it for what it was?

A. I didn't go over everything in the office of that nature.

Q. I understood you went over everything from stem to stern while you were there.

A. I am afraid that is a little bit wrong.

Q. I am sure you will remember this, that Dr. Lutfy on one or more occasions showed you quite a number of slides and photographs of a clinical nature which he had, pictures he had made of various conditions that had been presented to him by his patients in the course of his professional practice.

A. Yes, he came up one evening and showed us some of those pictures and pictures of his family.

Q. You recognize, do you not, you are aware that many [310] physicians and surgeons make a photographic record of virtually every case that goes through the office of any consequence?

A. No, I am not aware of that.

Q. You are not aware of that?

A. No, sir.

(Testimony of Howard H. Whitsett.)

Q. By that you mean you don't know whether that is true or not?

A. Of the number of doctors I have ever examined has this been a practice.

Mr. Roylston: I couldn't hear the answer.

The Witness: I said of any of the doctors whose returns I have examined was that a practice.

Q. (By Mr. Parker) Have you ever examined a situation of a surgeon doing any plastic surgery?

Mr. Roylston: I object unless it is shown the doctor is a plastic surgeon.

Mr. Parker: Very well, I will withdraw that question.

Q. (By Mr. Parker): To progress to one other subject. Do you recall—of course you know Mr. Howard Linsenmeyer, do you not?

A. I saw him in Court.

Q. That wasn't the first time you had seen him, was it? A. Yes, sir.

Q. That was the first time you had seen him?

A. That was the first time I had seen him, yes, sir. [311]

Q. I may be under a misimpression but I was under the impression you and Mr. Tucker, oh, some three or four months ago had gone out to the Maricopa Packing Company which he operates and talked with Mr. Howard Linsenmeyer there.

A. I wasn't present.

Q. You were not present? A. No.

Q. And it is your testimony you had never seen him before? A. No, sir.

(Testimony of Howard H. Whitsett.)

Q. Now, with regard to these gifts from Mrs. Linsenmeyer you did make some investigation among the members of the Linsenmeyer family pertaining to that?

A. Yes and we searched the records of the Collector of Internal Revenue for gifts filed and recorded.

Q. Now, of course unless you made a gift of more than \$3,000 in any one year there wouldn't be any gift file on her, would there?

A. I believe that is the exemption.

In other words, any gift under \$3,000—I mean if the total of gifts in any one calendar year is not in excess of \$3,000 it is exempt and your bureau would not be concerned with such gifts from a tax point of view?

A. They are not taxable, I believe. I am not a gift tax agent so I don't keep up with that too well.

Q. You did contact Mr. Otto Linsenmeyer, the attorney? [312]

A. Yes, I met Mr. Otto Linsenmeyer.

Q. And Mr. Otto Linsenmeyer told you his mother had made a practice of making gifts of articles of clothing and money to various members of the family?

A. He mentioned occasionally they received gifts. There wasn't very much conversation on that score from him.

Q. How many other members of the Linsenmeyer family did you contact with respect to that subject?

(Testimony of Howard H. Whitsett.)

A. Mr. Otto Linsenmeyer is the only one I have ever met before.

Q. You did not meet or discuss this matter with Mrs. Lutfy?

A. No. I believe the only time I saw Mrs. Lutfy, I am not too sure it was Mrs. Lutfy, or I wasn't at that time, I believe was the second time I was out there. Mrs. Lutfy was taking care of the office for a brief period and stepped into the office and spoke to me and I presumed it was Mrs. Lutfy but I didn't receive an introduction and wasn't positive it was she. I wouldn't have known her to identify her on the street.

Q. Now, referring once again to Exhibit 33, the so-called net worth statement, can you state of your own positive knowledge that the assets and liabilities listed here as of 12/31/45 constitute all of the assets and liabilities of whatsoever kind, character and nature and wheresoever situated, which [313] belonged to the defendant Dr. Lutfy at that date?

A. We made an exhaustive search and these were all we were able to find.

Q. Those were all you were able to find. But you cannot state they were all that existed?

A. I think that would be impossible for anyone but the doctor.

Mr. Parker: That is all.

(Testimony of Howard H. Whitsett.)

Redirect Examination

By Mr. Roylston:

Mr. Roylston: Just a few questions. This Government's Exhibit which I had marked, I believe the last one that was marked for identification, Government's Exhibit 36, I will offer it at this time.

Mr. Parker: May I ask Mr. Whitsett one question about this on the nature of voir dire question?

Q. (By Mr. Parker): Referring to this Exhibit 36, Mr. Whitsett, on the second page of the Exhibit I notice a "O.K." there. Did you ascertain from Dr. Lutfy or any other manner who put that "O.K." on that Exhibit?

A. No, sir, it wasn't mine.

Q. Did he not tell you that he had submitted this to the accountant who prepared this tax return for that year and that the "O.K." had been placed there by his accountant?

A. No, sir, I don't remember that statement.

Q. Would you say it had not been made to you or you [314] simply do not recall it?

A. I don't believe it was made to me.

Mr. Parker: Very well.

The Court: This is the item you offered earlier and Mr. Parker wanted to examine.

Mr. Roylston: Check the original, yes, sir.

The Court: It may be **admitted**.

(Government's Exhibit 36 marked in evidence.)

(Testimony of Howard H. Whitsett.)

Q. (By Mr. Royston): Now, Mr. Whitsett, referring to this Government's Exhibit 36, would you state just where you obtained the original of this document? A. From the doctor.

Q. And what particular book——

Mr. Parker: That has been asked and answered, your Honor.

The Court: You had him identify it when you first produced it.

Mr. Royston: I had forgotten.

Q. (By Mr. Royston): This document you stated came from the doctor's log book, did you have discussion concerning these particular entries which read under July 8th: "Lost to Les Madison, \$548." And July 30th, "Tiny lost \$200, total \$748." Did you have any discussion with Dr. Lutfy concerning those two entries?

A. I questioned him about that and he explained it was a [315] gambling loss playing poker. And I told him that was not a deductible item.

Q. Referring to the second page of the document then—this also comes from the doctor's records?

A. Yes. This was a listing of the entertainment expense sheet for the year 1946.

Q. And was that \$700—— A. \$802.70.

Q. Was this \$748 item included on the tax return as entertainment expenses?

A. The total was included on the '46 tax return as the entertainment expense for that year.

Q. The total? A. Yes, sir.

Q. Referring to some of your testimony during

(Testimony of Howard H. Whitsett.)

cross-examination in reply to a question which Mr. Parker asked concerning this Cable Trust Company real estate transaction, when Mr. Parker asked you why you could examine Dr. Lutfy's income tax returns which reflected that transaction as a long-term capital gain and why you could not inspect the Cable Trust Company's returns, I believe your answer was there was a different basis for the two, is that correct?

A. There was a different basis on the Statute of Limitations.

Q. Now, will you explain just what you meant they were on [316] a different basis?

Mr. Parker: Now, I object to his going into a discussion of the Statute of Limitations. And I think I have in mind what the answer might consist of if he is allowed to ramble freely and it would be prejudicial and quite improper. I didn't press the point——

The Court: I think it is an appropriate stopping place if we are not going to get into some collateral matter.

Mr. Royston: It might get into some prejudicial matters.

The Court: I don't say necessarily prejudicial, Mr. Royston, but collateral or extraneous. I am not ruling on the basis it might be prejudicial because I don't know but I think you might be getting off into some extraneous matters.

Mr. Royston: I will withdraw it.

Q. (By Mr. Royston): With reference to that sale in this Cable Trust Company transfer, the sale

(Testimony of Howard H. Whitsett.)

which you stated you computed as a short-term gain rather than a long term. A. Yes.

Q. Would you state just what particular date you used in deciding that the sale was a short-term rather than long-term capital gain?

A. I used the date of August 10th, the first action by the minor after he became of age in regard to his sale of the property. [317]

Q. And what was that first action after the minor became of age?

A. He signed the deed, I believe. And the closing I used the date, the last date when everything was closed and paid couldn't have been possibly any later than that; I believe that was January 22nd, which left a period of several weeks' variance lacking the six months' period.

Q. Now, with reference to the transaction which was the other real estate transaction which you computed as a short-term capital gain rather than long-term capital gain, I will refer to it as the Lantin transaction; just what was the specific date you used in determining the sale was actually completed?

A. I used the date that the buyer paid in his final payment because the title and trust company does not require the payment of the balance until the deal has been closed sufficiently to know whether or not the title would be clear. And at that time neither party could go back on their agreement and at that time the title passed.

Mr. Parker: If your Honor please, I am a little bit aroused at a layman making such sweeping state-

(Testimony of Howard H. Whitsett.)

ments of his conclusions of law. There certainly has been no qualifications shown by this witness to venture expert opinions on such a strictly and highly technical question of law, as distinguished from accounting, as that. I move this last answer, at [318] least that last portion of it, be stricken and the Jury instructed to disregard it. There is no showing this gentleman has had any legal training or possesses a license to practice law.

Mr. Royston: We are not claiming any such thing as that anyhow. All I am trying to show is what date this witness used in his computation and why he used that particular date.

Mr. Parker: Of course that was the original question and he had answered it before he got to this and he was simply, as I see it, giving an unresponsive part of the answer by way of justification of the date which he had used. But when he said he used the date when the buyer made the final payment to the title company he had given a complete answer to the question which had been asked of him. Then he went ahead to venture the conclusion of law and that is the portion I seek to have stricken from the record and the Jury asked to disregard it.

Mr. Royston: He may have answered a little further, but that was just an answer to my next question which would be as to why he used that specific date.

The Court: It may stand. I think the Jury understands the witness is explaining why and his reasons, only insofar as he has stated a legal opinion.

(Testimony of Howard H. Whitsett.)

they are the opinion of a layman. He is not testifying as a lawyer. He is merely explaining it to show how he did arrive at it. [319]

Q. (By Mr. Roylston): With reference to this matter of the stolen car did you deduct any expenses which the doctor claimed in connection with that or did you disallow any part of that other than the approximately \$1300 which were spent on investigation, 'phone calls?

A. On a net worth statement you don't disallow anything. The only way it affects the net worth is what you add back in as personal expenses, add to the increase in net worth. And the cost of the car, \$5400, was all that was added in as an expense or expenditure.

The Court: Now, will you tell me what you mean by that. Counsel asked you if you had taken away from it anything except the \$1300 and you have answered the question. Have you taken the \$5400 and added it in as a non-deductible expenditure?

The Witness: Yes, sir, as a personal expenditure for that year.

Q. (By the Court): In other words then the \$5400 does go to increase your unreported net income as it appears in this schedule?

A. That added to the increase in net worth.

Q. That is right? A. Yes, sir.

Q. It is reflected in what you have styled unreported net income? [320] A. Yes, the \$5400 is.

Q. (By Mr. Roylston): Then on an item like

(Testimony of Howard H. Whitsett.)

this when is the taxpayer allowed to claim that as a deduction, that particular expense?

A. When that has finally been settled and he knows just how much the loss suffered actually was.

Q. So that would have been in 1949 or some date past the period we are concerned with?

A. '50 or '51 somewhere.

Q. All right. There were quite a few questions asked by Mr. Parker concerning amounts of expenditures which the Government originally stated and the fact that now those amounts are decreased. I will ask you in the matter of personal expenditures if this decrease from what the Government originally stated down to what it is presently stated, if that is in favor of or against the taxpayer?

Mr. Parker: If your Honor please, before that is answered I want to challenge the form of the question. He refers to my questions of certain figures, certain original figures which were substantially less than the figures which Mr. Whitsett now comes forth with in his Exhibit 34. And the question assumes matters not in evidence, although there was some evidence that he had at some time had another set of figures which had been greater; but it seems to me that the form of the question may be contrary to the evidence. [321]

The Court: It is leading anyway. I will ask counsel to reframe it on that basis.

Mr. Royston: Maybe I misunderstood Mr. Parker's questions this morning and I don't have

(Testimony of Howard H. Whitsett.)

anything here that I know of to look to see what those amounts are.

Mr. Parker: I do. I have the Government's original proposed stipulation on it. I will be glad to show you the Government's figures right here.

Mr. Roylston: All right, the Government list, \$5,222.63 and now you state there was \$4,795—

Mr. Parker: No.

Mr. Roylston: Mr. Parker, I am reading off this thing you handed me.

Mr. Parker: For 1948 the Government's original figures proposed \$5,222.63.

Mr. Roylston: That is just like I read it. Let's read on across here.

Mr. Parker: Those are my notes.

Mr. Roylston: That is the question you asked him this morning.

Mr. Parker: No, sir. I asked him no questions based on these penciled notes of mine. I asked only about the Government's figures which are in typing here.

Mr. Roylston: Let me see that stipulation, please.

Q. (By Mr. Roylston): The figure, the 1948 figure, the [322] original stipulation which Mr. Parker discussed with Mr. Cass or somebody he was talking about this morning, if that showed \$5,222.63 and now your computation on Government's Exhibit 34, I believe is the number, the one we referred to as page 4, is \$5,560.61, what accounts for the difference in those two figures?

(Testimony of Howard H. Whitsett.)

A. I believe on that original stipulation that the figures were made up from the amounts paid that the Government at that time had witnesses to prove. Since then Mr. Parker and yourself have come to agreement on and stipulated to items, a great many more than were included in that figure or different ones.

Q. And those were matters which are covered in the checks which were, the cancelled checks which were in the doctor's records, is that right?

A. Yes, sir.

Q. Now, in connection with this photographic equipment that the doctor claimed as clinical photograph equipment on his returns, just how were those matters listed, those expenses for photographic equipment?

A. All the checks that were written were deducted as expenses. And on his '48 return he capitalized a round figure of \$2,000 and claimed depreciation on that.

Q. So these particular items were both carried as expenses and also depreciated, is that [323] correct?

A. That is correct.

Q. And what does that result in?

A. A double deduction on the return.

Q. Now, with reference to this matter which Mr. Parker brought out on his cross-examination in connection with this bank account you discovered in late 1953, these two accounts, and Mr. Parker's question concerning whether you were able to ascertain if Mrs. Lutfy in 1945 sold a diamond ring for

(Testimony of Howard H. Whitsett.)

\$3500; I will ask you to examine Government's Exhibit 7 and state whether or not the sale of a diamond ring for \$3500 is reflected on Bertha Lutfy's return for that year.

Mr. Parker: Your Honor, I submit it wouldn't need to be unless it was a capital gain that was taxable.

The Court: Isn't that correct, Mr. Royston? Would you put an item like that in the return?

Mr. Royston: Yes, I think it would have to be reflected in the return.

Mr. Parker: No, not at all, not unless it was a taxable gain. That is elementary.

Mr. Royston: It might be elementary, but I don't exactly agree with it. It may be that some of us think below the elementary level, but it is my understanding any sale of property such as that has to be reflected on the return.

The Court: I will settle that by ruling it doesn't have to be, to end the argument. [324]

Mr. Royston: All right, sir.

Q. (By Mr. Royston): There were questions asked by Mr. Parker as to whether in examining these cancelled checks of Dr. Lutfy whether you could tell that the purchase of the specific item was of a personal nature or of a business nature. Now, I am going to ask you if you had any trouble telling a dining room set should not have been listed as an automobile expense?

A. When I found it was a dining room table I had no trouble.

(Testimony of Howard H. Whitsett.)

Q. You had no trouble telling a Marietta dining set was not an automobile expense, is that correct?

A. That is right.

Q. Did you have any trouble telling whether a French Provincial table was drugs and supplies?

A. No, sir.

Q. Did you have any trouble telling whether these compotes or candy dishes were drugs and supplies?

A. No, sir.

Mr. Royston: That is all.

Recross-Examination

By Mr. Parker:

Q. Mr. Whitsett, did I understand you to say that the reason the Government's proposed figures for the Lutfys' living expenses paid by check were originally lower than the figures which you have set forth in this tax computation being [325] Exhibit 34 was that since that time we have stipulated on more things which were not in contemplation for stipulation at that time?

A. I believe I changed that to "different" at the end of the question. Maybe you didn't hear me, I am sorry. But there were stipulations, I don't have the figures or notes to know whether there were more, but there were a great many stipulated expenses and they were different than the ones I understand are made up in that total that you have quoted from.

Q. I think you are quite incorrect. I have the Government's proposals here and at the proper

(Testimony of Howard H. Whitsett.)

time I will offer them. I would like to ask you this. Are you not aware that at the time this lower figure for these living expenses was proposed by the Government that we then had in contemplation 142 stipulations, distinct stipulations of fact, which is substantially more stipulations than have been entered into here in this trial?

A. That total was not a total of all of those stipulations of expenditures on that first stipulation.

Q. They weren't all expenditures, no, but there were more stipulations as to expenditures contained in that, are you not aware of that fact, than there were in the stipulations contained here?

A. I was only talking about that total and these stipulations. [326]

Q. Frankly, I don't know what you are talking about, Mr. Whitsett, but I think I know what I am talking about. I think so, maybe not. That is all.

Redirect Examination

By Mr. Royston:

Q. The reason for the difference could have been was the Government didn't see fit to bring a witness here to testify to a 15 or \$20 item which has now been stipulated to, is that correct?

A. That is right.

Mr. Parker: If Your Honor please——

Mr. Royston: I was trying to straighten this thing out.

(Testimony of Howard H. Whitsett.)

The Court: I haven't heard Mr. Parker's objection yet.

Mr. Roylston: All right, sir.

Mr. Parker: In the first place it is a leading and suggestive question.

The Court: The objection will be sustained and the Jury will disregard the answer to it.

Mr. Roylston: No further questions.

Mr. Parker: No further questions, Your Honor.

(Government's Exhibit 37 marked for identification.)

Mr. Roylston: If it please the Court, at this time I will offer Government's Exhibit 37 for identification into evidence. It is a certified copy of assessments and payments. It is signed by the Chief of Collection Division of Internal [327] Revenue.

Mr. Parker: If Your Honor please, for the reasons stated in the objection the questions designed to the same end, we now object to that for the reason that it proves nothing with respect to the factual issue here. In other words, the factual issue here could be resolved as either contended by the defendant or the Government and still it would have not been influenced any way by that. In other words, that instrument could be as it is and the issue of fact either way. Therefore it has no probative value and to my way of thinking its tendency is to unfairly prejudice the showing which the defendant expects to make. Furthermore, it is an

anticipation of a defense which has not yet been put in by the defendant.

The Court: The objection will be sustained.

Mr. Royston: If I might be heard on one point. It is in reference to a matter brought out on cross-examination of the last witness by Mr. Parker, it is in reference to that matter.

The Court: It may be offered if it becomes pertinent. I doubt that it is now.

Mr. Royston: I don't want to belabor it. I want the record to show the Government also contends it is relevant to the point of cash on hand at the beginning point of this period, that this is in relation to that item, too. [328]

* * *

Mr. Parker: Your Honor, at this time there are some motions which will take some time to dispose of.

The Court: Ladies and Gentlemen, you will be excused at this time until Tuesday at 10:00 o'clock. Bear in mind during the recess the admonition that I have given you. Especially don't read any newspapers or news media about the case. I think you all appreciate that your verdict in the case must be based on the evidence that you get here and that is wholly and solely what you would base it on and not on any extraneous matter. I will ask you to bear that admonition in mind, and we will recess until 10:00 o'clock on Tuesday.

(The Jury retires from the courtroom.)

Mr. Parker: If it please the Court, the defendant moves the Court for a directed or instructed verdict of not guilty and for judgment of acquittal in this case upon a number of grounds which I trust I shall be able to enumerate with sufficient completeness to make clear the position which we take. In the first place, the general ground that the evidence in the case is insufficient to establish a *prima facie* case or to take the case to the Jury. Specifically and with more particularity we take the position and it is a part of the basis of our motion that this is not a case for the application of the net worth theory.

(Argument presented by counsel for the defendant.) [329]

Mr. Parker: Now, with the net worth theory out, if the Court should determine this is not a net worth case and the Government's case as far as it is could have been predicated on specific evidence, and I think that is clear, because actually when we get down to it the evidence taken in its light most favorable to the Government here simply amounts to the fact that there is a disagreement between the Internal Revenue Service and the defendant and accountants, whoever they were, that prepared the defendant's returns as to what deductions were allowable and what should have been taken and what should not have been taken, and the way I think it is that ninety per cent of the so-called unreported net income which, in fact, as Mr. Whitset admitted is not unreported income at all, it is reported but

it doesn't appear on that sum as net income for the reason there has been a difference in the manner in which the deductions have been applied. That the difference between this so-called unreported net income is accounted for, ninety per cent at least by the question of the different conviction as to the deductions to be taken. That it is basically, and I think a case where there is no occasion in practical operations or in law for resorting to the net worth theory. However, they have resorted to the net worth theory and the predicate upon which this Exhibit 34 is founded is the net worth theory of gross income and consequently if it should be decided here that the net worth theory is [330] not applicable here and should not be used then the Government has not made a case because the Government's very predicate of their case here, as is clear from these two Exhibits is a net worth theory and if that theory is wrong and shouldn't have been applied to this case then the Government's case is gone.

Now, I wish to assign another ground here and that is, even assuming that the net worth theory is applicable, which I don't think it is, I do not believe that the proof is sufficient, because the Courts have repeatedly said that in the application of the net worth theory there is no validity to it unless it encompasses all of the defendant's assets, particularly on the starting date.

(Further argument by counsel for the defendant.)

Mr. Parker: If Your Honor please, I want to further predicate this motion upon the proposition that the Government's evidence has not made out a prima facie case with respect to intent; that there is no substantial evidence from which the Jury could logically or reasonably infer the type of wilful, deliberate, criminal intent which must be proved beyond a reasonable doubt as any other fact or element in the case. And that for that reason the evidence seems to us to be sadly deficient. We, I suppose, possibly after a ruling on this motion might have some alternative motion we would want to present, but would probably be premature at this time. And I [331] think in substance, perhaps sketchily, I have stated the main basis of the motion at this stage of the case.

(Argument presented by counsel for the Government.)

The Court: I will reserve ruling on the motion. I want to read these cases that have been cited and also examine the 29, 30 and 31, I believe they are the Exhibits. And I will advise counsel at 9:30 on Tuesday. Will you have at that time, Mr. Royston, the information I asked you for this morning?

Mr. Royston: Yes, Your Honor.

The Court: We won't reconvene at 9:30, we will reconvene at 10:00, but I can advise counsel at that time and then make the ruling at 10:00.

Mr. Parker: If Your Honor please, in order to perhaps keep things better together in a parcel I would like to add a further motion which I hope

the Court will not construe as an expression of any lack of confidence I have in the motion formerly made; and that is in the event the Court should decide there is sufficient evidence in this case to take the matter to the Jury then I do move in such event that the Court strike from the evidence all of the evidence relating to net worth and instruct the Jury to disregard all of the evidence relating to net worth and the case go to the Jury not as a net worth but rather as an ordinary case which I think it must be if it is a case at all. However, as I say, I don't waive [332] the other motion which I regard perhaps more important than this. But it does occur to me if the Court should decide that the case should go to the Jury the Court might very well consider it not to be a net worth case, and in such event, although it is our position that they have got the net worth in there and it does constitute the basis of their computation of income and therefore the case actually couldn't very well go to the Jury if the net worth part were taken out, so I think probably this alternative motion is a little inconsistent with the situation here because I can't see how it will go to the Jury at all.

The Court: We plead in the alternative, I don't know why we can't move in the alternative.

Mr. Parker: At any rate, I leave the motion on the record.

The Court: Very well. [333]

September 14, 1954—9:30 A.M.

The following took place outside the presence of the jury.

The Court: May the record show that the jury is entirely out of the court room. Defendant is present with his counsel and the United States Attorney is present.

I have considered the defendant's motions over the week end and I have some concern with some points of the case. I am presently denying the motions, both motions, the motion for judgment of acquittal and to proceed without the net worth theory. Both of those motions will be denied. The jury will be here at 10:00 o'clock, so at this time we will recess until 10:00 o'clock.

(Recess.)

(The following took place in open court in the presence of the jury):

Mr. Parker: The first witness for the defense will be Mrs. Bertha A. Lutfy.

BERTHA A. LUTFY

called as a witness herein, having been first duly sworn, testified as follows: [334]

Direct Examination

By Mr. Parker:

Q. Will you state your name, please?

A. Bertha A. Lutfy.

Q. Where do you live at the present time, Mrs. Lutfy?

(Testimony of Bertha A. Lutfy.)

A. 125 East Missouri, Phoenix.

Q. Are you the wife of Louis P. Lutfy?

A. Yes.

Q. How long have you and Dr. Lutfy been married?

A. About sixteen and one-half years.

Q. Do you have a family?

A. Yes. I have three children.

Q. Mrs. Lutfy, your maiden name was what?

A. Bertha Linsenmeyer.

Q. Are you the daughter of, or one of the daughters of Ottelia Linsenmeyer? A. Yes.

Q. Is she alive or dead at the present time?

A. She is dead.

Q. When did she die?

A. January 2, 1950 or the 2nd, 1951.

Q. '50 or '51? A. Yes.

Q. When did your father die, if he is dead?

A. He died in 1934.

Q. Your mother then was a widow from 1934 until the date [335] of her death? A. Yes.

Q. Did she have a number of children, in other words, did you have brothers and sisters?

A. Yes, I was one of eight.

Q. How many are surviving at the present time?

A. Seven.

Q. We heard in this trial from Howard Linsenmeyer. Is he a brother of yours?

A. Yes. He is my younger brother.

Q. You are in what order of age among the girls?

(Testimony of Bertha A. Lutfy.)

A. I am the youngest of the girls.

Q. You are the youngest of the girls. Mrs. Lutfy, are you sometimes known as Tiny Lutfy?

A. Yes.

Q. Is that name commonly used by your friends?

A. Nobody knows my name as Bertha except when I sign a paper.

Q. Do you frequently sign your name as Tiny Lutfy?

A. Not legal papers, but everybody knows me by Tiny.

Q. Have you carried bank accounts in the name of Tiny Lutfy? A. Yes.

Q. How did this nickname—was there any reason for the development of this nickname? [336]

A. I received it at birth because I was a very tiny baby.

Q. You weighed only——

A. About four pounds.

Q. Your family dubbed you Tiny?

A. Tiny. All through school it was Tiny.

Q. That name has stuck with you, has it, throughout the years? A. Yes.

Q. Mrs. Lutfy, during your marriage to Dr. Lutfy, besides rearing these children, have you done any work outside of the home?

A. When my husband was in the Service I was in the real estate business for a short time there.

Q. What did you do in the real estate business?

A. I sold some property.

Q. You were a saleslady?

(Testimony of Bertha A. Lutfy.)

A. That is right. I had a license.

Q. By whom were you employed?

A. Mr. Guy Fisher.

Q. Is he a Phoenix real estate broker?

A. Yes.

Q. Your husband came back from the Service on about what date?

A. About October or maybe the first part of November in 1945. [337]

Q. At that time were you selling real estate?

A. Yes.

Q. Did you continue to sell any real estate after he got back? A. Yes.

Q. With reference to purchases and sales of real estate which have been testified to in this case, did you by reason of your being engaged in the real estate business have anything to do with those purchases and sales? A. Yes.

Q. What, in particular; did you locate the properties? A. That is right.

Q. Now, Mrs. Lutfy, I will direct your attention to the testimony which was given by your brother Howard, respecting certain practices followed by your mother, Mrs. Linsenmeyer, during her widowhood of making gifts to some members of the family, is that true? A. Oh, definitely.

Q. Directing your attention particularly to the years 1946, 1947 and 1948, did you receive from your mother any substantial sums by way of gifts of cash?

A. I would say they were substantial.

(Testimony of Bertha A. Lutfy.)

Q. Of course, I assume you have no record of them and kept none at the time?

A. No. [338]

Q. When were these gifts ordinarily forthcoming? Was there any special time or were they made at random dates?

A. Always at birthdays, Christmas and even Easter. She always gave something at Easter, too.

Q. Did she give other things besides cash?

A. Oh, yes.

Q. What did those things consist of?

A. Well, they would be anything from a fine lace tablecloth to a blanket, gold bracelet, things like that. Could be anything.

Q. Personal items of that sort?

A. That is right.

Q. During the three years that I have mentioned, what would you say, what amounts would you say the largest single gift of money was you received from your mother?

A. The largest single gift I ever received was \$300.

Q. Do you remember which of these years, '46, '47 or '48 you got that particular gift?

A. It was probably, I would say in '46.

Q. Now, Mrs. Lutfy, can you tell the Court and jury your best estimate of what these gifts would amount to averaged out over this three-year period, at least a minimum figure which they would amount to over this three-year period, per year?

(Testimony of Bertha A. Lutfy.)

A. I would say it was probably in the neighborhood of \$500. [339]

Q. Per year?

A. Adding what I would get at Christmas time——

Q. I am talking about the cash.

A. Yes, that is right.

Q. The cash gifts would amount to, you think, an average of \$500 a year?

A. That is right.

Q. What did you do with the cash gifts which you received from your mother with respect to the uses made of them?

A. They just seemed to go and I didn't seem to——

Q. What I mean is, were they used for general household purposes such as the purchase of foods, and so forth?

A. That is right. I didn't have anything to show for it.

Q. You didn't put these gifts away in a mattress or anything of that sort? A. No.

Q. Now, Mrs. Lutfy, was there anything characteristic about your mother with respect to gifts as between the various children. That isn't a very intelligible question. I will rephrase it. Did your mother disclose to all you children what amount or what she was giving at the time to other children in the family, or what was her attitude in that respect?

A. She was very odd about that. She never

(Testimony of Bertha A. Lutfy.)

wanted the next one to know what she gave to one because she never wanted [340] one to think she was giving one more than the other. Even when she would give me a gift of bulk of any size she would give it to me when I would arrive and insist I take it to my car and come back and spend the afternoon. She didn't want anybody to see what she was giving me.

Q. By that I assume you mean she didn't want to create any friction? A. Hurt feelings.

Q. Among the children over the prospects that one may have received more than the other?

A. That is right.

Q. Did your mother during her lifetime also from time to time loan money to various of you children? A. Very definitely.

Q. Do you know of her having loaned money to some of your brothers?

A. Yes. Let me see, the year even I could tell you. She has loaned amounts I know——

Q. Mrs. Lutfy, I just asked you if she did that? A. Yes.

Q. I wasn't probing specifically for the date. Now, Mrs. Lutfy, at the time of your mother's death, did she leave a substantial amount of cash and securities? A. Yes.

Q. May this exhibit be marked for identification? [341]

(Defendant's Exhibit C marked for identification.)

(Testimony of Bertha A. Lutfy.)

The Clerk: Defendant's C for identification.

Q. I show you a certified copy of an inventory and appraisement. Is that the inventory and appraisement made in the State Court by an appraiser appointed by that Court of your mother's estate?

A. Yes.

Q. The total amount of that estate as appraised by those appraisers was what amount?

Mr. Royston: I am going to object to this until it is offered.

Mr. Parker: I beg your pardon. I failed to offer these in evidence and I do so at this time.

Mr. Royston: I am going to object to this on the grounds it is in the year '51 and the only dates we are concerned with are '46, '47 and '48 and prior thereto.

Mr. Parker: It represents an estate hardly that would be accumulated in a short period of time, especially in view of the fact that——

The Court: It may be admitted as defendant's Exhibit C in evidence.

Mr. Parker: Ladies and gentlemen of the jury, I won't burden you by reading all of this exhibit. This is an inventory and appraisal made in the Superior Court of Maricopa County in the estate of Ottelia Linsenmeyer. The document is [342] dated March 31, 1951. The appraisers are Robert Long, Victor Steinegger and another name which I regret I am not able to pronounce, Albert Muckenthaler. As to the category of personal property, the inventory and appraisement reads as follows:

(Testimony of Bertha A. Lutfy.)

United States Bonds, \$11,595.50; 382½ shares of the capital stock of Maricopa Packing Company of the probable value of \$76,500; 3086 shares of the capital stock of Tovrea Land & Cattle Company, \$154,300; cash on deposit in a checking account in the First National Bank of Arizona, Phoenix, First Phoenix Branch, \$31,954.47; cash on deposit in a savings account in the First National Bank of Arizona, Phoenix, First Phoenix Branch, \$24,960.44. Then there are other items of various things of personal property. The total of the estate as shown upon this appraisalment and inventory is \$576,016.30 (Defendant's Exhibit C shows \$570,616.30).

Q. While we are on the subject, Mrs. Lutfy, I will direct your attention to the month of September, 1947, and the purchase of an automobile. Do you recall that? A. Yes.

Q. I would like to have this exhibit marked, please.

(Defendant's Exhibit D marked for identification.)

The Clerk: Defendant's Exhibit D for identification.

Q. Also this one.

(Defendant's Exhibit E marked for identification.) [343]

The Clerk: Defendant's Exhibit E for identification.

(Testimony of Bertha A. Lutfy.)

Q. Mrs. Lutfy, I show you defendant's Exhibit D for identification and ask you if you have seen that before? A. Yes.

Q. What is that?

A. It is a check made, Western Union Money Order, made payable to myself for \$5600.

Q. Did you receive that money order?

A. Yes.

Q. Who sent it, if you know?

A. My husband, Dr. Lutfy.

Q. What did you do with that money?

A. I bought a car.

Q. What kind of a car did you buy?

A. Lincoln Continental Convertible.

Mr. Parker: We offer photostatic copy of the money order.

Mr. Royston: No objection.

The Court: It may be admitted.

Mr. Parker: Ladies and gentlemen, I will hand you this Western Union Money Order, dated September 19, 1947, Mrs. Tiny Lutfy, \$5600, sent from Phoenix, September 18, 1947.

Q. Now, Mrs. Lutfy, do you know whether or not at the time your husband had \$5600, that is just prior to the sending of this money order? [344]

A. I don't think so.

Q. Do you know where any of this \$5600 came from?

A. He had some money and he got some from Mr. Basha.

(Testimony of Bertha A. Lutfy.)

Q. Did he borrow any money or get any money from your mother? A. Yes.

Q. To make up this sum? A. Yes.

Q. How much, do you know approximately?

A. I think around \$3200.

Q. Around \$3200, that is the best of your present recollection. Was that money ever repaid to your mother? A. No. It never was.

Q. While we are on the subject of this automobile, what happened to this automobile?

A. It was stolen.

Q. It was stolen. Did you and your husband make a claim to the insurance company for your loss on this car? A. Yes.

Q. Do you recall, by the way, about when it was stolen?

A. Just a couple of months, I believe, after we had it, probably in November.

Q. Now I show you defendant's Exhibit E for identification and ask you to take your time and look that letter over and when you have, tell me what it is. It is addressed to you [345] and also to your husband, is it not? A. That is right.

Q. It is a letter from the attorneys for the insurance company?

A. That is right, well, it just said that the policy was void.

Q. I see. Did you receive this letter in the regular course of the mails on or about the date it bears? A. Yes.

Mr. Royston: No objection, Your Honor.

The Court: It may be admitted.

(Testimony of Bertha A. Lutfy.)

Mr. Parker: Ladies and gentlemen, this is defendant's Exhibit E in evidence and I will not read it entirely. It is addressed to Dr. Louis P. and Mrs. Bertha A. Lutfy, 301 West McDowell Road, Phoenix, Arizona, dated February 4, 1948. "Dear Sir and Madam:—" By the way, this is on the letterhead of the firm of Phoenix Attorneys, Kramer, Morrison, Roche and Perry. "The London Assurance has referred to this office for attention the matter of your asserted claim under Automobile Policy Number 148323. The Company has made a very thorough investigation into the matter of such claim and is of the definite opinion that it cannot recognize the same. Therefore, if you feel that you do have a claim under such policy, you are expected to comply with all the conditions, stipulations and requirements therein or thereby imposed upon [346] you."

Q. The company, when you lost this automobile that was stolen at the end of '47, as I understand it, the insurance company refused to pay the claim for the loss of the car?

A. That is right.

Q. And did you thereafter, you and your husband, sue them?

A. Yes.

Q. You eventually took the matter, did you, to a high court on appeal?

A. Yes.

Q. Sometime later, do you remember how much later it was, or how many years later it was, you finally prevailed and collected some of the money?

A. Several years later.

Q. Several years later. Now, Mrs. Lutfy, do you

(Testimony of Bertha A. Lutfy.)

know whether or not on December 31, 1945, your husband had in effect any life insurance policies?

A. Yes.

Q. Do you know approximately the face value or face amount of such policies?

A. At that time I believe he had around \$45,000.

Q. Do you know whether or not any of those policies had been in force for some time?

A. Oh, yes. [347]

Q. Do you know whether any of those policies had been in force as far back as the date of your marriage to Dr. Lutfy?

A. Yes.

Q. By the way, what was the year of your marriage?

A. 1938.

Q. At that time was he practicing medicine?

A. Yes.

Q. Where was he practicing medicine?

A. In the Professional Building in Phoenix.

Q. Mrs. Lutfy, directing your attention to another matter, I will ask you whether or not your husband, Dr. Lutfy, has ever had any training in law?

A. No.

Q. Or legal matters?

A. No.

Q. Has he ever had any training or experience in the field of accounting?

A. No.

Q. Has he ever, to your knowledge, made any claim of having any particular knowledge of income tax matters or income tax returns?

A. No.

Q. Now, Mrs. Lutfy, at the time of your mar-

(Testimony of Bertha A. Lutfy.)

riage to Dr. Lutfy in 1938, where did you live, where did you establish a home?

A. We lived in a little apartment at 1317 North Central [348] in Phoenix.

Q. Do you know about how long you lived there? A. Over a year.

Q. Now, without going into minute details, as I recall the evidence shows here that in 1946 and 7, at least part of '48, you were residing in a house at 1125 Granada? A. 1305 East Granada.

Q. I beg your pardon, 1305 East Granada?

A. Yes.

Q. Will you describe that habitation in a general way at least?

A. It was a very small two-bedroom house. It was furnished, if you call it furniture, it was very modest.

Q. How was it furnished? Did you have new furniture? A. Oh, no.

Q. Where had you gotten the furniture? Had you gotten it all at one time or how had you acquired it? A. That came with the house.

Q. You bought the house furnished?

A. Yes.

Q. Was that a new house at the time or an old one? A. No. It was an older house.

Q. Then in '48, sometime in '48, am I correct in assuming that you and Dr. Lutfy and the family moved? A. Yes. [349]

Q. Where did you go to?

A. 714 West Maryland.

(Testimony of Bertha A. Lutfy.)

Q. Is that the property that has been described here as the apartment property?

A. Triplex.

Q. Now, describe that a little bit for us, just briefly.

A. It was just one long building with three doors, three back doors, concrete block. It wasn't even plastered, painted, it had cement floors with asphalt tile all over.

Q. At the time you moved into the triplex how many members were there in your family?

A. Three children.

Q. Three children and you and Dr. Lutfy?

A. Yes.

Q. Were you doing your own work at that time or did you have help?

A. I don't know if I had any help moving that time or not.

Q. How much of this triplex did you and your family occupy?

A. We used two units.

Q. Do you remember what time in 1948 you moved in there, approximately or roughly?

A. It was right after school was out, about the first part of June. [350]

Q. You lived there the balance of 1948 and on into 1949?

A. Yes.

Q. Now, did you during the period of June 1, '48, to the end of that year offer the third apartment for rent?

A. We offered the apartment for rent.

Q. Did you yourself take care of that matter?

(Testimony of Bertha A. Lutfy.)

A. Yes. I put an ad in the paper.

Q. You put an ad in the paper? A. Yes.

Q. Did you show the apartment to people?

A. Yes.

Q. When they came to see it? A. Yes.

Q. Did you keep it vacant and available for renting? A. Yes.

Q. And was it rented or were you successful in renting it? A. No.

Q. During that year? A. No.

Q. Later on did you make some other uses of it, that is, in '49 or '50 with which we are not concerned in this case? A. Yes.

Q. But during '48 it was vacant and being offered for rent? A. Yes. [351]

Q. Now, Mrs. Lutfy, can you tell the Court very briefly the kind of life you and your family led with respect to your standards of living and that sort of thing, just very briefly, or would you rather I ask you some specific questions about it?

A. Well, I wouldn't know where to begin. I mean, there just wasn't much to say.

Q. Were you folks at that time making a practice of going out to night clubs and that sort of thing?

A. Rarely. Rarely did we go to a night club. Our entertainment was a movie or visiting family members or friends, or friends visiting us.

Q. With respect to your food, was there anything unusual about the way you purchased food for the family?

(Testimony of Bertha A. Lutfy.)

A. Yes. I was fortunate there. I bought wholesale.

Q. You bought wholesale, and how were you able to buy wholesale? A. Through relatives.

Q. To whom do you refer in particular?

A. Bashas.

Q. Basha Brothers? A. Yes.

Q. Who are they with respect to what business?

A. They have a chain of grocery stores in the valley under the name of Bashas. [352]

Q. And you were able to and did buy most of your groceries there wholesale? A. Yes.

Q. With respect to the medical and dental care of the children, was there anything unusual about that?

A. Doctors' families never pay for medical services.

Q. You did not have to pay pediatricians and that sort of thing when the children were little?

A. No.

Q. Did you have to pay for the deliveries of the children? A. No.

Q. With respect to medicines for the family, were you in any respect fortunate there?

A. Yes. Fortunately all we needed for the children were vitamins and tonics. You know any child takes that. They were all given by the companies as samples.

Q. You mean the pharmaceutical firms provided samples and you used those in your family?

A. That is right.

(Testimony of Bertha A. Lutfy.)

Q. Did you give your children cod liver oil and that sort of thing? A. Definitely.

Q. Was that also included among the samples?

A. Certainly. I never bought anything like that.

Q. What about milk? Did you receive any gratuitous milk which was used for the [353] children?

A. I bought very little Carnation Milk. Most of it was all given by the Company, the Carnation Company.

Q. With respect and directing your attention always, of course, to this three-year period, can you tell the Court and Jury what you spent, what amount it took to feed the family, what amount you spent?

A. That, yes. I would say that it never went over eighty-five dollars. It was between seventy-five and eighty-five dollars a month.

Q. Seventy-five and eighty-five dollars a month?

A. Yes.

Q. You were able to do that because of this wholesale and gratuitous samples, and so forth?

A. Yes.

Q. How did the family dress with respect as to whether or not you dressed simply or elaborately?

A. We didn't go out very much, so there wasn't—it wasn't necessary to buy a lot of clothes. My children, they were very fortunate in having aunts and grandmother that kept them fairly well supplied with clothes. Then I would pass them from

(Testimony of Bertha A. Lutfy.)

my oldest boy to my youngest boy. I figured the little one was about three.

Q. You have two boys and a girl? A. Yes.

Q. Having six brothers and sisters and some aunts and [354] cousins and by your grandmother, you refer to their grandmother, you refer to your mother, they were kept fairly well supplied in clothing, is that your testimony? A. Yes.

Q. Now, Mrs. Lutfy, what is the disposition of you and your husband with reference to spending money, and in particular with reference as to whether or not you have practiced thrift in your personal expenditures during that particular time, I am referring to and I am especially interested in 1946, '47, and '48?

A. I pinched. I pinched during those years to buy property.

Q. Did you and your husband, during that time and prior to those years, systematically save money?

A. Oh, my, yes.

Q. Do I gather you saved it to a point of its being almost unpleasant to reflect on it? I will withdraw that question.

Q. There has been some reference to—there has been a witness, I believe, you were in the courtroom, by the name of Julia Sprague? A. Oh, yes.

Q. Do you remember her? A. Oh, yes.

Q. Did she ever work for you and Dr. [355] Lutfy? A. Yes.

Q. Do you remember about when it was, just roughly?

(Testimony of Bertha A. Lutfy.)

A. I think it was about '47. It was on Granada.

Q. Do you know of your own knowledge the purposes for which she was hired and the duties she was engaged to perform?

A. She was there as a sitter. She was an older woman and not too well. She helped me a little with the work and she was on twenty-four hours' duty with the telephone. That is why she quit, as a matter of fact, it was too much.

Q. Do I gather that you did most of your housework? A. Yes.

Q. And that she wasn't able to do regular or heavy housework?

A. No. She was a practical nurse.

Q. Her function was a baby sitter and to handle the telephone, and with respect to your telephone during this period, what kind of calls were being received in the main?

A. I would say ninety-five per cent were patients calling.

Q. Was Mrs. Sprague charged with the responsibility of taking messages and phone numbers and delivering those messages to the Doctor?

A. Definitely.

Q. Were her duties with respect to the telephone dependent on whether or not you and Dr. Lutfy were at home, or did she have those duties whether you were there or not there? [356]

A. I don't understand exactly what you mean.

Q. Let me rephrase it and put it this way. Supposing that you and Dr. Lutfy were there and you

(Testimony of Bertha A. Lutfy.)

had retired and it is two o'clock in the morning, did Mrs. Sprague have any responsibility as to the phone? A. She answered the phone.

Q. She took care of the phone? A. Yes.

Q. If it was a patient who wanted to speak with the Doctor, what did she do?

A. She would awaken him.

Q. By the way, did she represent that she had any particular skill or ability in the line of nursing or anything of that sort? A. Practical nurse.

Q. Do you know, of your own knowledge, whether or not she made a practice of advising the Doctor's patients from time to time?

A. Yes, she did.

Q. There was some statement I believe, by her to the effect that she did not continuously live at your house?

A. While she was in my employ she lived on the premises.

Q. The entire time? A. Yes.

Q. Did she have a room some other place which was kept [357] for some purpose?

A. She had a room she kept to store her trunks and once a week she went there to get her mail.

Q. By way of compensation, in addition to the twenty dollars a week I believe that has been testified to the Doctor paid, did she get room and board?

A. Oh, yes, and medical services.

Q. And medical services. Mrs. Lutfy, directing your attention to the year of 1945 I will ask you whether or not during that year you sold any article

(Testimony of Bertha A. Lutfy.)

of jewelry? A. Yes, I sold a diamond.

Q. A diamond ring? A. Yes.

Q. Was that in 1945 as best you remember?

A. It was in 1945.

Q. Do you remember to whom you sold the diamond ring? A. To Ping Bell.

Q. Who was she?

A. She was a Phoenix business woman.

Q. How much did you receive for the ring?

A. \$3,500.

Q. What did you do with the \$3,500.

A. I put it in the bank of Douglas.

Q. Do you remember whether it was distributed between two accounts or one account, and if so what kind of accounts? [358]

A. Yes. I put the biggest portion of it in savings account for the interest and the rest in a checking account.

Q. I recollect that the stipulated evidence here shows that there was a savings account at the end of 1945, namely, December 31, 1945, in the name of Tiny Lutfy in the Bank of Douglas in the amount of \$3,020? A. Yes.

Q. Was that part of the proceeds of that ring?

A. Yes.

Q. And there was a checking account in the Bank of Douglas on the same date in the name of Tiny Lutfy in, I believe, the amount of \$487, approximately that? A. Yes, that is right.

Q. Those two accounts were in the name of Tiny Lutfy? A. Yes.

(Testimony of Bertha A. Lutfy.)

Q. Was there anything unusual or any reason whatever to put them in any—to set them up any way they would not be discovered? A. No.

Q. Directing your attention to 1948, just prior, just before you moved to Maryland in the triplex, did you have a piano? A. Yes.

Q. What did you do with that piano, if anything? A. I sold it to Mrs. Basha. [359]

Q. What amount—how long had you had that piano? A. I had it several years.

Q. You had it before December 31, 1945, had you? A. I am not sure.

Q. What did you get for it? A. \$475.

Q. She paid you at the time, did she?

A. Oh, yes, a check.

Q. What general uses, if you recall, were made of that \$475?

A. The check was made out to me and I endorsed it and gave it to my husband and he banked it.

Q. I notice, going back just a moment, that the money from the ring in the Bank of Douglas diminished and a year or so later most of it was gone. Do you know how that was used in general?

A. Well, I bought—I bought a rug.

Q. Did you buy—

A. I lent my husband a thousand dollars.

Q. Buy any property or anything of that sort during that period? A. Not with that money.

Q. Now, did you use any part of it for general living expenses, and so forth?

(Testimony of Bertha A. Lutfy.)

A. Yes. If I had my check stubs I could show those. [360]

Q. Now, Mrs. Lutfy, you know about the Phoenix Sport Shop? A. Yes.

Q. I believe there is an exhibit here in the form of a letterhead introduced by the Government. I don't believe this is the one. I thought the sport shop letterhead had been introduced. Well, tell me this, do you know how and for what purpose the business title or name Phoenix Sport Shop was created or originated? A. Yes.

Q. Will you state to the jury what that was?

A. Well, I wanted to go in business and at the time I wanted to go in the import and export business because I had connections with an importer and exporter in San Francisco who is a friend of mine. Then you couldn't get the things at that time, you just couldn't get the merchandise, so my husband decided he wanted to have a sport shop. Instead of an import and export he would have a sporting goods shop. That is how this started, the Phoenix Sporting Goods.

Q. Did he ever, besides printing letterheads, did he ever actually open the sporting goods store?

A. No.

Q. Why didn't he, if you know?

A. You couldn't get anything. The good things you couldn't get.

Q. Did he maintain those letterheads over the years of [361] '46, '47, and '48?

A. He had them at that time.

(Testimony of Bertha A. Lutfy.)

Q. Do you know what use he made of that firm name, that business name during that period?

A. He bought several guns for relatives and friends.

Q. Buy any for himself, do you recall?

A. Yes.

Q. How many, do you know approximately?

A. I would say, probably, two of them.

Q. Two? A. Yes.

Q. Would you have any idea how many he bought for friends?

A. I never kept track, but I would say not more than six or eight.

Q. Mrs. Lutfy, was there any advantage, to your knowledge, in making these purchases for friends or for yourself in the name of the Phoenix Sport Shop?

A. There was a big saving. He got them wholesale.

Q. He got them wholesale. Do you know of your own knowledge whether or not he made any profit on guns that he purchased for friends?

A. No, he didn't.

Q. He did not?

A. No. He would usually show them the [362] statement.

The Court: At this time, members of the jury, we will take the regular morning recess for ten minutes.

(Recess.)

BERTHA A. LUTFY

previously called and sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Parker:

Q. Mrs. Lutfy, there is one point I should like to amplify somewhat, that is, in respect to the furnishings in the house on Granada at the time you purchased the house. Will you describe them somewhat more in detail?

A. Well, there was a Monterey living room set. There was also a Monterey dinette set. There wasn't any rug on the floor. It was padding, you know that they cement down, and that was the rug. Well, it was furnished very poorly.

Q. Was it completely or partially furnished?

A. We added some to it.

Q. During the period you lived there you added furniture to it?

A. We sold some of it off to a secondhand man, a junk dealer, and then we refurnished after awhile, we refurnished the living room and the dining room. We refurnished part of that place. I know the Monterey had springs sticking out.

Q. What was the condition of the furniture at the time [363] you bought the house with respect to whether it was dilapidated?

A. It was rickety. It was old furniture that had taken a beating.

Q. You replaced the dining room furniture and the living room furniture?

(Testimony of Bertha A. Lutfy.)

A. Yes, and repainted, drapes——

Q. You put drapes in? A. Yes.

Q. And did you put new rugs on the floor, carpeting, anything of that sort? A. Yes.

Q. Did you replace any of the beds, do you recall? A. Yes, in the children's room.

Q. When you sold the place you sold the furniture, did you? A. Yes.

Q. Mrs. Lutfy, did you ever have occasion to work in the Doctor's office?

A. Several times I filled in when the girl was ill, or something would come up.

Q. I will ask you if you ever saw Mr. Whitsett, this gentleman, before?

A. I saw him once in the office and once on the street.

Q. Do you remember whether or not you saw him sometime [364] in 1949 at the office, or thereabouts? A. Yes.

Q. What was he doing there at the time?

A. He was doing some checking and he wanted some old check stubs or vouchers, and I was looking for them for him and he told me not to bother, he would come back another day for them, and I insisted he wait for them, that I would find them, that they were there. In the meantime my husband came in and he knew exactly where they were and he gave them to him right away.

Q. Did Mr. Whitsett say anything about providing him with a place to work or a room to work in that day?

(Testimony of Bertha A. Lutfy.)

A. Yes. He was taken and given the back room.

Q. Did that room have a table in it?

A. Yes.

Q. Was there anything on that table?

A. There was a big enlarger about so big and occupied so much space.

Q. You are referring to a photographic enlarger? A. Yes.

Q. Do you remember what other photographic equipment was in that room at the time?

A. There was a square printer about this big and about so long, and like this, a drier, it is covered with canvas, that you put the pictures in, electric drier is what it was, [365] and the trays, photographic trays were on the table also.

Q. Did anything have to be done with respect to this photographic equipment in order to make space for Mr. Whitsett to work in that room?

A. Yes, it all had to be moved over so he could put his things on it.

Q. Mrs. Lutfy, do you know of your own knowledge whether or not your husband utilized in his professional practice photographic equipment?

A. Yes. I have helped him take some pictures even.

Q. You have helped him take pictures?

A. Yes.

Q. What kind of pictures?

A. Kodachrome slides. I helped him take a picture of a tumor that was about so big that he brought home and we put it on the lawn and filled it

(Testimony of Bertha A. Lutfy.)

with the garden hose to take a colored slide of it.

Q. Did he take pictures frequently in the office of patients that might have some visible signs of disease and that sort of thing?

A. I have seen the pictures that he has taken but I can't say I was always there when they were taken. I have seen them. I know he did, yes.

Q. Are you able to state whether or not his interest in photography was primarily connected with his professional work? [366]

A. At that time, yes.

Mr. Roylston: I object as conclusion.

Mr. Parker: That may be leading and may be a conclusion. I think she observed what his interests were.

The Court: She may tell what she observed.

Q. I believe you already answered the question?

A. Yes.

Q. Mrs. Lutfy, I will ask you whether or not to your knowledge your husband ever sought to conceal any records, destroy any records, or in any way deceive or mislead Mr. Whitsett or any other representative of the Internal Revenue? A. No.

Mr. Roylston: Before this is answered, I didn't hear the first part of the question. If it is what she did, I have no objection. If it is what the Doctor did, it would be outside of this witness' knowledge of what the Doctor did.

Mr. Parker: I asked her "to her knowledge."

Mr. Roylston: I will withdraw my objection.

Q. Did you ever seek to deceive Mr. Whitsett

(Testimony of Bertha A. Lutfy.)

or any of his associates respecting your business and financial affairs? A. No.

Mr. Parker: You may cross-examine.

Cross-Examination

By Mr. Royston: [367]

Q. Mrs. Lutfy, I believe you stated you worked as a real estate saleslady? A. Yes.

Q. While your husband was in the Service?

A. Yes.

Q. About how long was your husband in the Service? A. About seven or eight months.

Q. About seven or eight months, is that your answer? A. Yes.

Q. During this time that you worked for, I believe you stated, Fisher? A. Mr. Guy Fisher.

Q. Was that during the year 1945?

A. '45, yes.

Q. Do you recall approximately what your income was from the real estate work? First, let me ask you this. Were you paid on a salary or commission basis? A. Commission.

Q. Do you recall approximately what your income was during that period?

A. I am trying to figure the commissions I made. Probably that year I may have made around seven or eight hundred dollars.

Q. That was during the year of——

A. '45.

Q. That was reflected on the '45 return? [368]

A. I told my husband about it, yes.

(Testimony of Bertha A. Lutfy.)

Q. What I was trying to establish is the year it was in. A. '45.

Q. For the income year of '45? A. Yes.

Q. Now, concerning the testimony of the gifts which were made by your mother during her lifetime. I believe you stated that the largest single cash gift you received was about \$300?

A. That is right.

Q. These other articles, lace tablecloth, and different clothing gifts and such that she made, those were kept and used by the family, is that correct?

A. What do you mean?

Q. In other words, you didn't take these articles in and get the cash for them or sell them to anybody? A. No, no.

Q. You kept those gifts? A. That is right.

Q. I believe you were questioned whether your husband had any life insurance policies prior to 1945? A. Yes.

Q. To your knowledge were these policies ever cashed or did he make any loans from the company?

A. He made loans on them, yes. [369]

Q. This loan you were talking about——

A. All I can say, he borrowed from life insurance companies.

Q. Is that approximately twelve or fifteen thousand dollars loan, is that the one you are talking about now?

A. That is from an insurance company.

Q. Prior to 1945 do you recall whether he received any specific amounts from loans from insur-

(Testimony of Bertha A. Lutfy.)

ance companies or from surrendering any of those policies? A. I don't believe so.

Q. With the exception of that, I have forgotten if it is twelve or fourteen or fifteen thousand dollar loan, with the exception of that, do you recall any other loans he made from life insurance companies?

A. During that year, I don't believe so.

Q. Now, as far as you know, did he cash any of these life insurance policies in, surrender them, during this period, '46, '47, and '48?

A. I don't think so. I am not sure.

Q. Now, concerning this automobile which was stolen, Lincoln Continental Convertible, I believe it was, this exhibit, I think it was "D," the money order, that is the sum of \$5,600. Do you recall what the purchase price of that automobile was?

A. I think it was fifty-four something. [370]

Q. Now, where were you when you purchased this automobile? A. In Chicago.

Q. You purchased the car in Chicago?

A. Yes, sir.

Q. Do you recall where you purchased it?

A. In a bank. The transaction was handled in the bank.

Q. I mean, was it from a local automobile agency in Chicago?

A. The car came from a local Chicago agency, yes. That is where it was driven out of.

Q. Did you purchase it from the agency?

A. It was—I don't think that the agency sold it

(Testimony of Bertha A. Lutfy.)

directly to me. I paid a man in the bank for it, but the car I picked up at the agency.

Q. This person you paid the money to, was that a man connected with the bank or with the automobile agency?

A. With the automobile agency I believe.

Q. As best you remember, the purchase price was \$5,400? A. I believe it was 5,400.

Q. Now, do you know why the loss of that automobile would have been listed on the return as \$6,700, Mrs. Lutfy?

A. We had quite a lot—I would say there was expense involved.

Q. Just what type of expense, Mrs. Lutfy?

A. Well, there were telephone calls, there were—we [371] had to get a lawyer. My expense involved in flying back there, that ran the price of it up.

Q. You included your transportation to purchase the car, you included that? A. Yes.

Q. As a loss? A. Why, yes.

Q. Where were you when you first learned of the car? A. In Phoenix.

Q. Then you flew back there and had the money wired to you? A. Yes.

Q. At the time you didn't see fit to take the money with you?

A. All I was to do was to fly back there. When the car was to be purchased the money was sent to me.

Q. So you estimate there were approximately

(Testimony of Bertha A. Lutfy.)

\$1,300 expense that you added on to the loss of the car for your income tax purposes, is that correct?

A. I don't know the exact amount.

Q. But that would explain why the figure is listed as \$6,700 instead of \$5,400, is that correct?

A. Yes, it would.

Q. Concerning your mother and her business, I believe your brother testified that when your father died he left a [372] sizable estate and your mother held it together over the years, is that correct?

A. Yes.

Q. Do you know whether the size of the estate increased between the time your father died and the time your mother died?

A. Oh, yes.

Q. Your mother handled all of the estate herself, is that correct; in other words, after your father died, everything was left to your mother and she handled it?

A. Yes.

Q. Your mother was relatively well versed in business affairs, is that right?

A. I would say yes and no.

Q. In other words, in managing several hundred thousand dollars worth of property she knew fairly well what she was doing?

A. She sought other advice constantly.

Q. At the time this loan was made from your mother, was a note given to her for the loan?

A. I don't know about that.

Q. I believe you stated the loan had never been paid, is that correct?

A. That is right.

(Testimony of Bertha A. Lutfy.)

Q. Did it show up in the estate as an asset of the estate? [373]

A. It was a verbal thing, no, no.

Q. So that the estate never collected the amount of that loan? A. No.

Q. Was it deducted from your share of the estate? A. No.

Q. I am going to show you Government's Exhibit 27 and ask you if you recognize the handwriting down there as your husband's handwriting?

A. Part of it.

Q. Can you show me which particular parts?

A. This is, this is, this isn't.

Q. In other words, starting with the word "depreciation" all the way down to the words "improvement and addition" all that from depreciation to the words improvement and addition is in your husband's handwriting, is that correct?

A. Yes.

Q. So this depreciation schedule, the entire schedule itself is figured up in the Doctor's handwriting?

A. I don't know who put the check mark there, but the rest is.

Q. So, he knew enough about accounting to figure up a depreciation schedule?

Mr. Parker: That is objected to as argumentative.

The Court: Objection sustained. [374]

Q. Concerning this triplex which there has been quite a bit of discussion about, I believe you stated

(Testimony of Bertha A. Lutfy.)

your family used two units? A. Yes.

Q. Wasn't the third unit used as a workshop or a storage room, something of that nature?

A. Later it was.

Q. That was after the year '47. Do you recall what year that was in?

A. We didn't buy it until '48, wasn't it.

Q. I may be off on the figures, but during the year '48 was it used as a workshop or do you recall?

A. I don't know for sure if it was maybe the latter part of that year or in '49, but after I couldn't rent it it was used as a workshop.

Q. Concerning this lady, Julia Sprague, that lived there with you and your family, do you recall approximately what period of time she lived there on the premises? A. It was quite some time.

Q. Wasn't she employed as a regular employee approximately three months then came in on part-time basis for baby sitting after that three-month period?

A. I never had her just as a baby sitter. All the time she was employed by me, she lived on the premises.

Q. What I am trying to get at, there was a three month's [375] period she lived with the family all the time, then after that three months' period she came in and worked whenever you called her to come in and work?

A. No. She was employed by me twice, and while she was employed she lived with me.

Q. Do you recall the approximate length of time

(Testimony of Bertha A. Lutfy.)

she was employed there and lived there on the premises?

A. I don't recall, no I don't. There was a little break in there somewhere but I don't recall exactly when that was.

Q. Do you recall if it was three months would be the approximate length of time?

A. I couldn't say.

Q. Concerning this photographic equipment, I believe that you stated to your own knowledge your husband's main interest in this photographic equipment was in a clinical nature? A. Yes.

Q. Was it his usual procedure to take those clinical photographs on the front yard of your home?

A. This particular one where I assisted him was on the front yard of my home.

Q. Did he collect together his photographic equipment, the tumor and the whole works and bring it out to your house and spread it on the front yard?

A. No. He brought the tumor in a pan from the hospital and the camera. He had a picture of the patient before [376] surgery when the abdomen was tapped to take the liquid out, and after surgery because it was very unusual and we even had a ruler there to try to measure it.

Q. This was on the front yard of your home?

A. That is right. I didn't want it in the house and we used the garden hose to try to fill the tumor up.

(Testimony of Bertha A. Lutfy.)

Q. The point I am trying to get at is, was the photographic equipment at the home?

A. No. He brought it with him.

Q. He brought the tumor and cameras and the whole works out to your home to make the picture?

A. What do you mean by the whole works?

Q. Whatever is necessary to make these photographs. Did you use anything else beside the camera? Did you use any special lighting fixtures or anything like that?

A. It was outside. We didn't need any additional lights.

Q. Let me ask you this question. If the Doctor had the necessary equipment down at his office and had the tumor there do you know why he brought it home to make the photograph on the front yard?

A. Because I helped him with it.

Q. I say do you know why he brought it home. In other words, why wasn't the picture made down at the office where the photographic equipment was located, do you know?

A. Well, he took pictures before surgery. [377]

Q. I am talking about this big tumor thing.

A. He took pictures before surgery at the hospital, then after surgery he brought this home and took the last of them.

Q. You don't know why he didn't take the picture of the tumor at the office where the photographic equipment was located?

A. I wouldn't say that the photographic equipment was at the office at the time. As I remember,

(Testimony of Bertha A. Lutfy.)

he brought the camera with him because he had taken pictures at the hospital also.

Q. So he brought it to make it in the front yard?

A. We were closer to it.

Q. Is that his usual clinical procedure with his photographic equipment?

A. In that particular case that is what I can answer because I was there and helped.

Q. Now, Mrs. Lutfy, I believe you testified at great length you lived very simply and frugally during this period of '46, 47, and '48? A. Yes.

Q. I believe you stated that you fed two adults and three children on a total of seventy-five to eighty-five dollars a month? A. Yes.

Q. You fed the five of you on seventy-five to eighty-five [378] a month? A. Yes.

Q. That is the total for all of the family?

A. Yes.

Q. During this period of '46, '47, and '48, did you do any entertaining to any extent at home; by entertainment I mean anything in the nature of cocktail parties or dinner parties or anything on that line?

A. My house wasn't fit to entertain at cocktail parties. The only entertainment I did in my house was when my brothers would come to my home for dinner and we had another couple, very good friends at the time, and they would drop in, or we would drop in at their place.

Q. Outside of that additional entertainment, you

(Testimony of Bertha A. Lutfy.)

fed your family on seventy-five to eighty-five a month during this period, is that your estimate?

A. Yes.

Q. During this period that you were living very frugally, I believe you stated you went out, or almost never went out?

A. I can remember six months at one time where I never even went to town.

Q. During this period of '46, '47, and '48 you or your husband or the family, I don't know how it is, carried on, but at any rate you were members of the Arizona Country Club in Phoenix, isn't that correct? [379]

A. Let us find out exactly when we joined there because the club wasn't even built.

Q. Let us put it this way. Sometime during the period of, that is in question here, either '46 or '47 or '48, for several months during that period you were members of the Country Club?

A. We paid dues.

Q. That is rather an exclusive Country Club in Phoenix?

A. They call it the poor man's country club in Phoenix.

Q. During this period that you were living very frugally, I believe at one time you owned a Cadillac automobile, isn't that correct?

A. That was—I received that for rent on a piece of property.

Q. At another time during this frugal period is

(Testimony of Bertha A. Lutfy.)

when you purchased this Lincoln Continental Convertible? A. Yes.

Q. That was during this frugal period?

A. Yes.

Q. You owned a station wagon at one time during the frugal period, is that correct? A. Yes.

Q. During this period you had at least one automobile and most of the time you had two, is that correct, or three? A. Oh, no. [380]

Q. Did you ever have over two?

A. No. I don't know who would drive it. The babies were small.

Q. Did you have two automobiles during much of the time?

A. Not during all that period.

Q. During part of the period you had two automobiles?

A. I would have to check. During a portion, but not all the time.

Q. It was during this period you were living very frugally on a very small amount, it was one time during that period a neighborhood poker party you lost approximately five hundred and some dollars, and on another neighborhood poker party you lost a couple hundred?

A. It wasn't a neighborhood poker party.

Q. This party among a group of your friends. What I am getting at is this. This poker party with your friend, Mr. Madison and some other friends, you lost on one occasion five hundred and something and on another occasion two hundred and some-

(Testimony of Bertha A. Lutfy.)

thing, this is during the period you were living frugally? A. Yes.

Mr. Royston: That is all. [381]

Redirect Examination

By Mr. Parker:

Q. Mrs. Lutfy, there are one or two questions I would like to ask. With respect to this Lincoln that was stolen at the end of '47, had you folks put any extras on it or done any work on it between the time you bought it and the time it was stolen?

A. Oh, yes. Wasn't a spotlight put on it, and my husband's uncle made him a sterling silver gear shift, quite an ornate piece of equipment; that was there.

Q. Do you remember buying any special type of jack?

A. Yes. We bought, I think, a hydraulic, what kind?

Q. Do you remember whether or not a spare tire came with it at the time you bought it for \$5,420, whatever the cost was? A. I don't know.

Q. You don't remember that?

A. I can't say.

Q. Did you make a claim to the insurance company? A. Oh, yes.

Q. Was the claim in the same amount that Mr. Royston mentioned, the \$6,700, as far as you recollect, or do you know? If you don't remember——

A. The car was insured for, I believe it was, a stated amount, \$5,400.

(Testimony of Bertha A. Lutfy.)

Q. Mr. Roylston indicated you had claimed \$6,700. Do you [382] remember whether or not the claim was based on the present value of the car in Phoenix at the time?

A. Yes, I believe it was.

Q. Do you know whether or not your husband secured legal advice with respect to the making of that claim? A. Yes.

Q. Mr. Parker: May this be marked for identification.

(Defendant's Exhibit F marked for identification.)

The Clerk: Defendant's Exhibit F for identification.

Q. Mrs. Lutfy, look this letter over, read it through from start to finish and then I will ask you a question. Do you remember whether or not you have ever seen that letter before? A. Yes.

Q. Is that a copy of the letter your husband sent to the lawyer at the time? A. Yes.

Q. Was James Struckmeyer your lawyer at the time? A. Yes.

Q. That is the Phoenix firm of Struckmeyer and Struckmeyer? A. Yes.

Q. Does this letter pertain to the loss of this car? A. Yes.

Mr. Roylston: No objection.

Mr. Parker: We offer it in evidence. [383]

The Court: It may be admitted.

Mr. Parker: Ladies and gentlemen of the jury, I will read you this Exhibit F which is now in evi-

(Testimony of Bertha A. Lutfy.)

dence. This letter is dated March 17, 1948, and addressed to Mr. James Struckmeyer, 207 Luhrs Building, Phoenix, Arizona. "Dear Sir: I am inclosing herewith a copy of our complaint, having filled in under paragraph 2, the sum of \$77.00 which represents extra equipment carried in the automobile at the time of the loss.

"I checked with Mr. Stevens of the Lincoln-Mercury-Phoenix, Inc., today, and the cost of delivery of an automobile similar to the one we lost amounts to \$5,472.15. The actual cost for our car, however, in Chicago, was \$5,420 which does not include a little over \$1,000 of commissions and extras paid for this car.

"I would like to have your comments on the following: 1. The advisability of suing for the actual market value of the car, \$6,500 instead of the regular list price of \$5,472.15. 2. The addition of interest starting two months after the loss of the car, and running up to the time that cash settlement is made. 3. Punitive damages.

"Call me at your convenience. Sincerely yours,
L. P. L.:rm, encl."

You did pay somebody a commission in reference to the acquisition of this automobile? [384]

A. Yes.

Q. Now, Mrs. Lutfy, is your husband in the habit of gambling at cards or otherwise?

A. No.

Q. One matter I forgot to ask you about. Do you know whether or not he makes a practice, and

(Testimony of Bertha A. Lutfy.)

did during the years of '46, '47, and '48 of remembering some or all of his patients at Christmas time with small gifts? A. Yes.

Q. Do you know why that is done, the purpose of doing that? A. It is good business.

Q. A matter of good will?

A. That is right.

Q. There has been some testimony here regarding certain purchases at Rosenzweig's, consisting of some compotes. What is a compote; I wouldn't know?

A. A compote, well, this one was hollow ware, a silver one. It is a silver dish with a little stem on it that I myself purchased for a gift for a patient.

Q. Was that given to a patient? A. Yes.

Q. Did you ever use it? A. Oh, no.

Q. Were there other similar gifts from time to time [385] acquired from Rosenzweig's and elsewhere? A. Various places, yes.

Q. What season of the year would Dr. Lutfy ordinarily make such gifts?

A. At Christmas time and then if a patient had—a real good patient—like their son would get married or if they happened to be a friend of ours. You have some patients that you have had for years that are also friends, and I mean there comes an occasion with a new baby or something where you give gifts. You have got to.

Q. Was that done to stimulate his professional business? A. Yes.

Mr. Parker: That is all.

(Testimony of Bertha A. Lutfy.)

Recross-Examination

By Mr. Roylston:

Q. Do you recall who those compotes went to?

A. That I don't even remember the year. I don't even remember the year they were purchased in, but at the time I bought several different gifts.

Q. You bought the gifts?

A. Yes, but I don't know what went to who.

Mr. Roylston: That is all. No further questions.

Mr. Parker: We are approaching the hour of 12:00. Mr. Roylston and I have agreed last week that if Mr. Otto [386] Linsenmeyer, an attorney and brother of Mrs. Lutfy and brother of Howard Linsenmeyer, a witness here and a son of Ottelia Linsenmeyer, if he were present he would testify in substantially the same manner as Howard Linsenmeyer regarding gifts made by his mother to various members of the, what we will for convenience, call the Linsenmeyer family, which includes Mrs. Bertha Lutfy.

Mr. Roylston: It is so stipulated.

The Court: Counsel have agreed, members of the jury and you have heard the agreement and stipulation, that if Otto Linsenmeyer, a brother of Mrs. Lutfy, were called to the witness stand, his testimony concerning the practice of Mrs. Linsenmeyer in giving gifts to members of the family would be the same as that heretofore given by Howard Lin-

senmeyer. So you will take that, namely, if he were called he would so testify and you will treat it as if he so did testify. [387]

* * *

R. DALE MOSER

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Parker:

Q. Will you state your name, please?

A. R. Dale Moser.

Q. Where do you live, Mr. Moser?

A. 5975 Orange Blossom Lane, Phoenix, Arizona.

Q. How long have you lived in Phoenix? [391]

A. Since July, 1950, temporarily; I brought my family over, my wife over in February, 1951.

Q. And where did you live prior to moving to Arizona?

A. In Los Angeles, most of my life, some little while in Sacramento.

Q. Mr. Moser, what is your occupation or profession?

A. I am a Certified Public Accountant.

Q. How long have you been a Certified Public Accountant in Arizona and licensed as such?

A. I was a Certified Public Accountant when I came to Arizona, and the law of Arizona requires you have residency of one year before you are

(Testimony of R. Dale Moser.)

given a certificate in Arizona. So I have been certified in the State of Arizona since 1951.

Q. Were you certified as a Public Accountant in the State of California before you came to Arizona?

A. Not as a Public Accountant, as a Certified Public Accountant. They have two of them over there that they don't have in Arizona.

Q. How long had you been certified over there?

A. In 1947.

Q. Had you previously had some training in accountancy?

A. Yes, I had. I had taken a course of accountancy with the LaSalle Institute, which I graduated from, then after coming back from the service I took some postgraduate work, residency at the Southwestern University in Los Angeles. [392]

Q. Had you previously attained a college degree?

A. Yes, I had.

Q. At what institution?

A. At the University of Southern California.

Q. And are you affiliated or associated with any firm of accountants?

A. Yes, I am a general partner in the firm of L. N. Treadaway & Associates.

Q. Where is the head office of that firm?

A. In Phoenix.

Q. Does your firm, of which you are a general partner, have offices in other cities in Arizona and California?

(Testimony of R. Dale Moser.)

A. We have an office in Tucson; we have an office in Los Angeles.

Q. Have you had an office here in Tucson, your firm, for some time? A. Yes, we have.

Q. And you have an office in Los Angeles?

A. Yes, we have.

Q. How many Certified Public Accountants are associated or employed with your firm in the Phoenix office?

Mr. Royston: I object to that as immaterial.

The Court: He may answer.

A. I believe at the present time we have 11 Certified Public Accountants in our Phoenix [393] office.

Q. Mr. Moser, will you relate to the Court and the jury the general nature of your accounting work—well, in order to limit it, since, say, 1950?

A. Since 1950 I have engaged in the general practice as a Certified Public Accountant continuously, in which I have conducted several audits, large, small and medium size and have prepared tax returns for a great number of our clients, have represented our clients in discussion of their tax returns with the representatives of the Federal Government.

Q. Have you done that in a great number of cases or only in isolated cases?

A. In a considerable number of cases.

Q. Have you audited the books and records of clients big and small in connection with their income tax troubles and disputes?

(Testimony of R. Dale Moser.)

A. Yes, I have.

Q. Now, Mr. Moser, did you ever have any experience as a tax official?

A. I don't know whether you would call it an official or not; I was with the State of California Income Tax Division for about two years prior to entering the service.

Q. And you were in the military service during the war years? A. That is right.

Q. Now in connection with your auditing work since the [394] war have you had occasion to make audits over quite a wide area of the world?

A. A considerable extent of it, yes. I wouldn't say all the countries, of course, but Tokyo, Okinawa, Guam, and then several eastern cities in the United States.

Q. Ever been south of the border as an auditor?

A. Mexico City.

Q. And your firm has sent you as far as Tokyo, Japan, to make audits of books of companies?

A. They have.

Q. And how recently was that?

A. That was last year, I believe, early part of last year.

Q. Now, Mr. Moser, I assume you belong to some professional society or societies?

A. Yes, I do.

Q. What?

A. I belong to the American Institute of Accountants; I belong to the Arizona State Society of Certified Public Accountants, and belong to the

(Testimony of R. Dale Moser.)

Maricopa Society of Certified Public Accountants.

Q. Mr. Moser, are you acquainted with Mr. Whitset here? A. I have met Mr. Whitset.

Q. Are you acquainted with Mr. Tucker?

A. I have met Mr. Tucker. [395]

Q. Are you acquainted with the Regional Attorney at Los Angeles for the Internal Service, Mr. Cass? A. I have met Mr. Cass.

Q. Have you had dealings with some or all of these men in connection with this and other cases?

A. I have.

Q. Mr. Moser, you know Dr. Lutfy?

A. Yes, I do.

Q. And have you been employed by him for some time to do auditing work?

A. Yes, I have.

Q. And do you recall about when he employed you?

A. It was in the latter part of 1951.

Q. In the latter part of 1951?

A. '51. I can't give you the exact day.

Q. What was the nature of the work for which you were employed by him?

A. Dr. Lutfy had received notice that he was being investigated or had been investigated and received notice from the Internal Revenue Department that he was being considered for indictment, and asked me to check into his records and help him establish his innocence in this case.

Q. Mr. Moser, I assume you are being compensated for your services? A. I am. [396]

(Testimony of R. Dale Moser.)

Q. Does your compensation depend in any way upon the outcome of this case?

A. It does not.

Q. Now, Mr. Moser, upon your being employed by Dr. Lutfy did you undertake an audit of his books and records? A. I did.

Q. And did you find that he had books and records? A. I did.

Q. And will you relate in a general way or describe in a general way to this jury what you did by way of auditing his books and records, and for especially the years 1946, 1947, and 1948?

A. I examined his duplicate deposit slips for the years 1946 and major portion of 1947. They were photostatic copies which had been obtained by the Revenue Department and turned over to Dr. Lutfy when they were through with them.

Q. If you will talk a little slower and a little louder. I realize you are looking at me and the jury is sitting over there. If any juror cannot hear the witness at any time, if you will hold up your hand I am sure Mr. Moser will talk louder and slower. I interrupted your answer.

A. (Continuing): I examined the photostatic copies or deposits which had been retained by the Revenue Department in their investigation and turned over to Dr. Lutfy for the year 1946 and major portion of 1947. The year 1948 they did [397] not have the photostatic copies, but Dr. Lutfy told me he had gone to the banks with the Revenue people and identified the names on the deposit slips for

(Testimony of R. Dale Moser.)

that year. We did not obtain those photostatic copies from the banks because it was difficult to tie in item for item, due to the doctor's writing which is not most legible and the fact there were many items of income or monies coming to the doctor which were not professional income. Our major project at the time was to determine whether or not the doctor had reported as professional income all of the money which had been deposited in the bank which could not be identified as coming from some other source. For the two years which we had deposit slips to substantiate any computation we found that he had reported substantially more professional income than went into the bank. In other words, we could eliminate all items which had been deposited in the bank which could be identified as coming from some other source; and by the elimination of these items the remaining deposits which went in the bank were less than the doctor reported as income for that period.

Q. You did examine then his income tax returns for 1946, 1947, and 1948? A. Yes, I did.

Q. And you have those copies, do you, in your file? A. Yes.

Q. From which you have been working? [398]

A. That is correct.

Q. Just briefly state, Mr. Moser, to the jury what other records you found that the doctor kept or had kept for him in the course of his business and profession?

(Testimony of R. Dale Moser.)

A. I found that the doctor kept a log book, which is a common book used by most professional men, most doctors, which is arranged to give them the information that they require for their daily work. These log books show the patients by name, whether it was a charge, whether it was a cash call or whether it was something paid on account. Also has sections in which expenditures, that is expenditures may be listed; it has summaries, places for summaries where monthly summaries can be made of expenses and all income and has spaces for yearly summaries where the entire year's work can be summarized.

Q. Now, Mr. Moser, just by way of letting the jury know what we are talking about I have simply picked up at random a book here stamped 1948. What is this?

A. This is a daily log for physicians.

Q. Is that what you are talking about——

A. That is the book I am talking about.

Q. ——when you say log book?

A. That is correct.

Q. Did he have such a log book for each of the three years that were involved here? [399]

A. Yes, he did.

Q. Do you know where this type of log book, are you familiar with this type of a form?

A. Yes, I am familiar with that. I have purchased that form for other doctor clients.

Q. Is this designed specifically for doctors?

A. It is, yes.

(Testimony of R. Dale Moser.)

Q. Put out by some national publishing or whatever kind of company puts them out?

A. That is correct.

Q. Is this type of record, a daily log book, used widely by physicians and dentists?

A. Yes, it is.

Q. People of that character. Now, in this log book will you state to the Jury the nature of the data which the log book contains so that they may know?

A. It has a page for each day in which the patient's name is listed here, type of service, whether it was a charge and the amount of the charge, whether it was a cash call and the amount collected, or whether the patient paid something on account which he had previously charged. They have a page for each day. At the end of each month they have a business summary which shows the total cash business, the total received on account and the total cash received; it also has charge business and total business, which is, you can see from this, [400] was not compiled, just the cash transactions were compiled by the doctor's secretary. It also has spaces for listing expenses under various categories, such as drugs and supplies, salaries and labor, stationery. Then it has summaries, in which these items are summarized at the end of each month.

Q. Now, Mr. Moser, I believe I understood you to say this is a rather customary record widely used by doctors and dentists?

A. That is correct.

(Testimony of R. Dale Moser.)

Q. From an accounting point of view does this type of record have any manifest imperfections, Mr. Moser? A. Yes, it does, definitely.

Q. What would be the criticism of this type of a record?

A. This is what we would call in general accounting more of a daily journal, and the daily journals are then posted into a general ledgers and subsidiary ledgers in which a debit and credit is posted for each item so the books are always in balance; if anything is incorrect in the journals, not shown correctly on the ledger it would be out of balance and be able to detect it. This method of accounting you have merely a summary of what transpired. That has to be, your figures for a year have to be compiled from that. They are not automatically proven by a double entry system which we use in almost all accounting phases.

Q. I take it this is not a double entry [401] system? A. No, it is not.

Q. It is a recognized system but not the double entry system? A. That is correct.

Q. Then I take it from what you have said that errors when they occurred would not become obvious so readily in this type of system as would be the case of a double entry?

A. That is correct. There is nothing to indicate there is an error unless it is rechecked would be the only way you would find an error. There is nothing obvious from the records.

Q. What other types of records did you find that

(Testimony of R. Dale Moser.)

the doctor kept and which you resorted to in your audit?

A. I found that he kept his cancelled checks, which I examined. I found that he kept a patient card for each patient, which I examined.

Q. Now, on this patient card what sort of material was entered there usually?

A. There was entered only for the patients who had charged their call, not for the ones who had paid cash at the time of the visit.

Q. The cash ones went in the log book?

A. The cash ones went in the log book and there was no patient record maintained for that. But a charge was placed upon the card from the log book, then when the patient paid it was recorded in the log book and, of course, finally posted to [402] the card.

Q. Are you referring, Mr. Moser, to the same log book and patients' cards or clinical cards, as they are sometimes referred to, that the Government's witness, Mrs. Raye Way, talked about when she was on the witness stand here?

A. Yes; the same cards and same log book.

Q. You say you found cancelled checks?

A. That is correct.

Q. And were there check stubs?

A. There were check stubs in most cases and some cases they were counter checks or checks written away from the office and not given a number and would be signed by the doctor and went through

(Testimony of R. Dale Moser.)

his counter course, so they would not have a stub for those.

Q. What percentage or proportion, roughly, of his cancelled checks were what you refer to and describe as counter checks?

A. I would say, just as a hazard, it would be probably less than one-half of one per cent.

Q. Most of the checks he had a stub and it was written out? A. Written on the stub.

Q. In a regular check book?

A. That is correct.

Q. Now, did you have occasion to examine his bank [403] statements? A. Yes, I did.

Q. Those are the yellow ledger sheets of the kind Mr. Wightman who was here as a Government witness from the bank had?

A. That is correct.

Q. Now, from your examination of the doctor's records, and based upon your experience as an accountant and an auditor, would you say that the doctor during the years here in question kept and maintained a regular set of books?

A. Yes; I would say he kept a regular set of books.

Q. And based upon that same experience, what could you say, if anything, with regard to how his books compared for completeness and detail with other books and records which you have had occasion to examine and audit of similar types?

A. Well, I have found some that had much less regularity than Dr. Lutfy's; I have found some that

(Testimony of R. Dale Moser.)

have had more, that were more complete, I would put it that way, than Dr. Lutfy's.

Q. With reference to average, how would you say his books and records stacked up as professional records?

A. I would say for a professional man they would be about average.

Q. About average? A. About average.

Q. Now, did you ascertain—I assume in the course of [404] your audit you had occasion to consult with Dr. Lutfy frequently?

A. That is correct.

Q. Did you ascertain in the course of those conferences and consultations whether or not he has any training in accounting or any particular familiarity with it?

A. He gave no indication of having.

Q. Did he disclose to you in the course of these conferences you had with him any particular familiarity with the principles of income tax, federal income tax accounting?

A. Not to a great extent, no.

Q. Now, Mr. Moser, as you have heard in the course of this trial the Government is apparently relying primarily upon a net worth approach to the problem of Dr. Lutfy's income for these three years. Are you familiar with that net worth method of arriving at income? A. I am.

Q. Could you for the benefit of the Jury and maybe for my benefit tell the Jury in a few words

(Testimony of R. Dale Moser.)

or define this net worth method that is employed in this case by the Government agents?

A. The net worth theory is that given a certain amount of assets at a starting point and having a certain amount at a later date there must have been a certain amount of income in order to provide for the additional assets. That in a [405] nutshell is the theory.

Q. Does that theory stand up if in the meantime the particular individual has non-taxable sources of income?

A. I think, Mr. Parker, that what I meant was that he would have to have income, not necessarily taxable, but you would have to show that all sources of income that he had, taxable or non-taxable, would come to this point. In other words, there could be a considerable amount of non-taxable income or there could be——

Q. Does it involve a matter of covering every single last asset as of the starting period in order to be valid?

A. That is correct.

Q. Assume that for instance some item, we will say, for example, like cash on hand, were not definitely ascertained as of the starting point, would the method be valid?

A. It would be subject to quite a good deal of criticism because you have not established the fact he might have spent a considerable amount of money which they did not give him credit for. It would throw the whole theory out if there was any considerable amount of money.

(Testimony of R. Dale Moser.)

Q. Now, Mr. Moser, I believe we were furnished with a copy of Government's Exhibit Number 33?

A. That is correct.

Q. You have a copy of it there—I don't necessarily want it, but that was, as I remember, Mr. Whitsett's [406] computation which is supposed to represent Dr. Lutfy's net worth as of December 31, 1954, and then as of the end of each year to and including the year 1948? A. That is correct.

Q. Now, you are aware, are you not, of the certain stipulations which have been entered into in this case? A. Yes, sir.

Q. I will ask you, Mr. Moser, if you prepared a net worth statement for Dr. Lutfy for the same period covered by the net worth statement represented by Exhibit 33? A. I did.

Q. And do you have that with you?

A. Yes, I do.

Q. Will you produce the original of it, please?

A. This contains one for each of the three years.

Q. You have prepared one showing the starting point insofar as it has been disclosed here?

A. That is correct, sir.

Q. And showing the net worth at the end of 1946? A. That is correct.

Mr. Parker: May this be marked for identification?

(Defendant's Exhibit G marked for identification.)

Q. (By Mr. Parker): Referring to defendant's Exhibit G for identification, I will ask you, Mr.

(Testimony of R. Dale Moser.)

Moser, what was the source of your asset figures which you used in the preparation [407] of that Exhibit?

A. Exhibit 33 of the Government and their net worth statement.

Q. In other words, to prepare the Exhibit G you accepted and used the figures produced by the Government?

A. That is correct.

Q. Now, am I correct in understanding that in the bill of particulars and other conferences with the Government you had been given a different set of figures?

A. That is correct.

Q. And the first time you got these figures was here in the courtroom the other day?

A. That is correct.

Q. Nevertheless you took their figures and you used the Government's figures they contend for for the preparation of this net worth statement?

A. That is correct.

Q. Would you, in order that we may have continuity, would you produce the net worth statement for the year 1946?

A. You mean of the Government's?

Q. Yours. A. This is mine.

Q. This is 1946?

A. Yes, this is starting December 31, 1945, transactions and ending up with 1946. [408]

Q. How would be the most intelligible way to handle these, put them all before the Jury at once or take one at a time?

(Testimony of R. Dale Moser.)

A. I think you would have to take one year at a time.

Mr. Parker: We offer defendant's Exhibit G for identification, subject, of course, to the explanation I expect to elicit from the witness the same as we did with Government's Exhibit 33.

Q. (By Mr. Parker): Does this cover all three years?

A. Yes. It can be separated if you wish.

Mr. Parker: I didn't realize it covered all three years, but that is fine. We offer it, your Honor.

Mr. Royston: It is offered for all three years now?

Mr. Parker: Yes.

Mr. Royston: No objection.

The Court: It may be admitted.

(Defendant's Exhibit G marked in evidence.)

Q. (By Mr. Parker): While Miss Dougherty is marking that Exhibit, do you have copies of this Exhibit which we can hand to the Jury so they can follow your discussion of it? A. Yes.

Q. And also for the Court. Now, Mr. Moser, I must confess something that you already know, and that is that I am an ignoramus on subjects of accounting, and, therefore, I would like to ask you to explain to the Jury how you compiled this, [409] what its significance is, referring to defendant's Exhibit G in evidence?

A. I have taken the net worth at the beginning of the period which was on Exhibit 33——

(Testimony of R. Dale Moser.)

Q. Now, Mr. Moser, as you say this am I clear that you have taken the Government's figures?

A. The alleged net worth on Exhibit 33, I have so termed it.

Q. For instance, this \$1,000 cash on hand, were you able to verify that figure in any manner?

A. No, I was not. I have taken the Government's figure on that for that item.

Q. Okay. Taking the Government's figure, now go ahead.

A. In the first column are the items that are contained in Exhibit 33 for the year December 31, 1945. The items are the same, they are rearranged somewhat in order to more effectively show what this statement will prove. In the second column I have taken the funds which were available at the beginning of the year, which were the cash funds, I have included all items of income which we definitely know about which were non-taxable and which were taxable. In the third column I have shown up under the cash position the amount of cash that was on hand at the end of the year.

Q. That again is an arbitrary figure; were you able to find any verification—— [410]

A. No. That is an arbitrary figure as taken from Government's Exhibit 33, that is correct. We must be able to have that much on hand as well as spend the money which was spent during the year in order to balance out, so that is added to the expenditures in that third column. Then the items on the fourth column we have carried over to the alleged net

(Testimony of R. Dale Moser.)

worth for 1946, the items which the Government in their Exhibit states the doctor had on hand at the end of that year. You will notice in column two some initials after various amounts. Over on the right-hand side of the page under the title "Legend" you will see the "N. T." represents non-taxable income and a "R." represents reported income which was reported upon the return of the doctor for that year. You will notice that the doctor was able to, from the funds available, to have what the Government alleged he had at the end of 1946 and still have \$2,244.22 available funds on hand.

Q. You mean additional funds over and above what he reported and what he spent and what the net assets had gained? A. That is correct.

Q. I see. In other words, do I understand you correctly that he had a margin of \$2,244.22?

A. That is correct, sir. We could take these items right straight down and I will show you where he got the money, what he spent it for and what he had left.

Q. And that is all based on Government figures, is it? [411]

A. That is based on Government figures. We have to begin, December 31st, 1945, we have cash on hand and in the banks a total amount of \$7,854.09 less the outstanding checks at that date, bringing a net total of \$7,839.99. During the year the doctor received upon the note receivable from Fred Baier, \$2,210.13. This income was non-taxable, it was the result of a prior sale in a prior year in which he

(Testimony of R. Dale Moser.)

had reported the gain when he made the sale. This was merely money which he had not collected on the sale owed to him and he collected during the year. Under E. Norris there is the collection of \$1,200 which is in the same category and James Porter for \$496.38. And further down you will find the item of \$12,818.88 that represents the net proceeds from this property which has been discussed in the trial as the Cable Trust property. That was the amount of net receipts the doctor received for that property and he reported that on his income tax return. The next is a sale on a piece of property, and this is the net amount which he received, and that was reported on the sale on his tax return. The next item is professional income reported, in the amount of 21,947.70. That was the amount the doctor reported on his return. And the amount of rental income, \$2,325. Interest income, \$450.09. Dividends, \$25. The next item is the sale of personal assets, guns and binoculars, which the doctor had; they were sold without profit and are non-taxable. The next is a refund from Mehagians of \$251.12. That was non-taxable. [412] It was not paid during the year 1946; it was from a prior transaction. The next is a collection of a loan to a Mr. Marsh, \$288.12, which was non-taxable. The next is the net proceeds of the Federal Savings and Loan which he made application to borrow, \$12,000; he actually received \$3,000 less the charges upon that loan and he received in the amount of \$2,608.79. And the next item is an insurance recovery from the National

(Testimony of R. Dale Moser.)

Liability Company, \$235, which was likewise non-taxable, making total receipts of \$59,713.18. Now, in order to establish the net worth as alleged by the Government at the end of the year he would have had to have in the bank and on hand at the end of the year the total of \$3,240.30, that is excluding the outstanding checks, would be \$4,069.67 for bank statements, less outstanding checks was \$829.37. He would have had to have a Ford at a cost of \$2,498.02, for which he traded the Ford he had at the beginning of the year plus \$266.02 in cash. He had to have a Cadillac which he paid \$3,386.84. He had to have medical equipment in the amount of \$8,294.28 to which he had to spend \$4,183.94 to add to what he had at the beginning of the year. Then he built a building at 301 West McDowell on which he spent \$21,429.07; and he had landscaping, \$310; paving and grading of Lot 3, Block 2 in the Brill Addition, \$487.95; and what was termed in the Exhibit 33 as remodeling, \$181.54. In addition to that he repaid on the money he borrowed from First Federal Loan \$1,430. He bought \$500 worth of preferred stock in the Clinical Laboratories. [413] He paid professional and rental expenses which he claimed \$19,037.76 less the amount of 2,384.33, which are included in these items which the Government alleged are net worth. So we can't charge the doctor with spending the same money twice. If we are going to charge it as expense in the net worth section we are going to have to eliminate it from the ex-

(Testimony of R. Dale Moser.)

penses he claims. Then we have the amount of personal expenses which the Government alleges he paid by cash, \$4,683.09, and included in that amount is an allowance for \$783.22, representing items which are also included in the 19,000 figure we have up here. Then it was stipulated he had spent \$1,500 in cash rather than check, making a total \$57,468.96. He had funds provided of 59,713.18; he spent and had on hand 57,468.96. So he had additional funds available of \$2,244.22.

Q. All right, Mr. Moser, I wanted one comment from you regarding the two real estate transactions before we go to the next page. That Cable Trust property that I believe the evidence shows was escrowed on April 4th to purchase and on December 20th to sell and possession taken of it on June 15th and prorated the taxes to June 15th, then the other sale to the man from Globe. As an accountant and tax man would you regard those as long-term or short-term gains?

A. I would regard them as long-term gains.

Q. If I recall rightly, Mr. Whitsett chose to regard both of them as short-term gains? [414]

A. I believe that is correct.

Q. Just tell the Jury so that we will understand what difference does it make from a tax point of view whether you regard them as short-term or long-term?

A. Well, a long term gain is for property held more than six months, and the income tax law states that property held for more than six months was

(Testimony of R. Dale Moser.)
taken into income only for fifty per cent of the gain; if it is held less than six months it is taken into income one hundred per cent of the gain.

Q. Then it makes a substantial difference——

A. A substantial difference.

Q. ——as to the amount of income one would owe——

A. That is correct.

Q. ——whether it was a long or short-term gain?

A. That is correct.

Q. Are many of these transactions which you have encountered and which are encountered each day debatable in some respect as to whether they are long-term or short-term?

A. Oh, yes, there are many cases which are debatable, carried to the Supreme Court, some of them.

Q. Now, Mr. Moser, if you will go to the second page of the Exhibit G and will you explain this Exhibit, sir?

A. Yes; this is the same type of Exhibit.

Q. I mean this part of the Exhibit.

A. This is the same type Exhibit we just went through for [415] the year 1946 except this is for the year 1947, starting on December 31st, 1946, and ending on December 31st, 1947. You will notice in addition to the Legend we had on the first Exhibit we have two other items of explanation. Under "1," which is keyed in on the third column to the figure \$1,442.59. That represents the amount which was paid to the First Federal Loan Company to liquidate the liability of \$1,615.85 existing at December

(Testimony of R. Dale Moser.)

31st. That was paid in January of '47 and because of the early payment and the fact he did not draw \$9,000 of the \$12,000 loan which had been granted him they reduced the financing charges to that extent. So to liquidate that \$1,615.85 liability he only was required to pay \$1,442.59. And the second is keyed into the professional and rental expenses claimed. The amounts which he claimed is reduced by the amount of a refund he received from the Western Camera Shop which I believe was introduced by the Government, by the showing of a check which they had paid, making the net amount he paid \$18,663.29. The other items, we started with a net cash, \$3,240.30. He collected the balance of the note of Fred Baier for \$1,189.87, which was non-taxable. He collected \$1,200 from E. Norris, which was non-taxable. He sold his Ford for \$2,000, which he reported on his income tax return. He sold his Cadillac for \$5,750, which he reported on his income tax return. He collected \$29,921.82 from professional fees which he reported on his income tax return. He reported \$5,747.75 from rentals [416] on his income tax return. He reported \$132.53 from interest on his income tax return; and he reported \$25 from dividends on his income tax return. Then he received \$3,500 loan from his wife's mother, which was non-taxable. He received \$1,000 loan from Eddie Basha and repaid that loan. That was likewise a non-taxable transaction. He had an insurance recovery of \$225.60 which was non-taxable. He had the sale of a piano, \$475, which was non-

(Testimony of R. Dale Moser.)

taxable. He had a refund from the Southern Pacific Railroad in the amount of \$210.68, which was non-taxable. Making a total funds available of \$54,618.55 for the year 1947. With that money he had to have on hand at the end of the year, according to the bank statements and the figure of \$500, which is alleged by the Government, a total of \$3,231.10, which we have reduced for outstanding checks in the amount of 575.03, leaving a net cash balance of \$2,656.07. He had to purchase \$965.22 worth of medical equipment to have the balance alleged by the Government of \$9,259.50 at the end of the year. These other items, there were no changes and carried right straight across. He had them at the beginning and he had them at the end. I previously explained that he paid back \$1,000 which he borrowed from Eddie Basha; he purchased a Buick automobile for \$3,950. He purchased a Mercury automobile for \$2,956.84. He purchased stock in the Arizona Country Club for \$500. He purchased a bond in the Arizona Country Club for \$1,000. The next item, \$1,442.59, we previously [417] explained is a liquidation of a liability for a prior year. He purchased Lot 7, Block 2, Tres Palmas, for \$6,414.43. He completed what has been termed in Exhibit 33 as "remodeling" \$1,861.26. He purchased a Lincoln automobile for \$5,420. The personal and rental expenses claimed on his return, a net figure of \$18,663.29 is computed on the right-hand side of the page up there. The personal expenses alleged by the Government which he paid by check, \$6,967.72, and

(Testimony of R. Dale Moser.)

again that is reduced by the figure 1,073.73, which represents items included in professional and rental expenses claimed. It was stipulated that he spent \$1,620 in cash. With the expenditures of that money he purchased the additional net worth assets as alleged by the Government and he had from the end of the year before, he had additional available funds of 5,244.22. We add that to the funds provided for the year, gives us a total of \$56,862.77. We subtract the total expenditures made during the year and he has \$51,837.42. We find he had additional funds available, more than enough to account for his net worth of \$5,025.35 at the end of the second year.

Q. All right, Mr. Moser, if you will turn to 1948 now. Explain that sheet, please.

A. This again is similar to the first Exhibit. We have two or three more explanatory items on the right-hand side. In addition to the non-taxable income and the reported income we have "B.N.T.," which is Believed Non-Taxable Income. And [418] we have "P.T.," which is Partially Taxable Income. Then under the notation "1," which is keyed in on the first column to this figure and on the last column to this figure, represents a Buick automobile he had on hand at the end of the year and which he traded for furniture and which had a value as alleged by the Government at \$1,231.48 of \$3,423.50. That transaction did not represent the exchange of cash in any way.

Starting again with the net cash available we had

(Testimony of R. Dale Moser.)

2,656.07. He collected from Mr. Norris \$1,600.09. He sold the property at East Granada for a net figure to him of \$8,825.01; that was reduced by the amount of 6,361.06. In other words, he collected cash for the difference between 8,825.01 and 6,361.06. The 6,361.06 is then carried over to the net worth column at the end of the year as the amount receivable from that sale from the party who made the purchase. Then we have down here the next item of \$525, which I have indicated as partially taxable income. That represents a redemption of the Clinical Laboratory stock which was called at 105 and he was paid \$525 for his stock which he had originally paid \$500 for. That would represent a capital gain because it had been held over six months and \$12.50 of that should have been reported in income but was not, but the remaining portion, the other \$512.50, was not taxable income. Then he received a loan of \$15,000 from the Northwestern Mutual Life Insurance Company. He reported a rental income, I mean, professional income, of [419] \$37,105.29. He reported a rental income of \$7,735. He reported interest income of \$310.10. He received from an accident policy \$30. And he had a refund from Coles Home Furnishings of \$283.05, which was non-taxable income. That has a total funds available of \$68,081.55. With that money he spent an additional \$768.80 to increase his medical equipment to \$10,028.30 as alleged by the Government at the end of 1948. The item 6,361.06 represents the receivable on the sale of the 1305 East

(Testimony of R. Dale Moser.)

Granada property. The next items are carried over from the first of the year to the last, he had them on hand at the beginning; he had them on hand at the end. Then he paid back to the Northwestern Mutual \$200 on the loan during the balance of the year from the time he borrowed it. He purchased Lots 19 and 20 in the Evans Addition for \$6,670. He purchased the 7th and Maryland property for \$20,017.93, of which he owed \$10,000, so the net amount spent would be \$10,017.93. The next item which goes over to net worth as explained previously is the furniture which he received in exchange for the Buick automobile. He built an addition to his building, \$15,356.42. He invested \$7,000 in Linsenmeyer Investment Trust. He claimed professional and rental expenses of \$21,253.89, of which \$2,912.20 are included in these net worth items above, taken out in order not to charge him twice for the same expenditure. Likewise, as alleged by the Government, he paid \$5,660.61 personal expenses by check. Included [420] in that amount is the sum of \$855.48, which is likewise included in the \$21,000. So that is eliminated to avoid duplication. He also paid, as stipulated, \$1,620 in cash.

At the end of 1948 he had funds provided of \$68,018.55. He had additional funds available from the prior two years of \$5,025.35, making a total of \$73,043.90. Total expenditures were \$70,863.28, making a net additional funds available for the entire period of \$2,180.62 more than was necessary to

(Testimony of R. Dale Moser.)

arrive at the net worth as alleged by the Government.

Q. Now, Mr. Moser, does your net worth computation as reflected by this Exhibit G indicate any unreported income? A. No, it does not.

Q. And I take it that by referring to "additional funds," you mean that he had that much over and above accounting for the increase in his net worth? A. That is correct.

Q. And now, Mr. Moser, did you compute the income tax for the various years?

A. I did not.

Q. Why didn't you?

A. Well, in a net worth case such as this we have shown, where we have shown where there was no unreported income the only question resolves as to a possible disallowance of certain deductions or an adjustment for this purpose or that purpose; that can only be ascertained as to the amount [421] which would be agreed upon by a consultation between the taxpayer and his representative and in taking item by item as to whether they were taxable or not taxable. For that reason I have not computed any tax.

Q. Do you find an unusual number of items claimed as deduction which may be debatable one way or the other?

A. There are quite a few which may be debatable, quite a few.

Q. Is that the customary way to arrive at a solution of that kind, a problem as between the tax-

(Testimony of R. Dale Moser.)

payer and Government, to take them item by item and determine if possible whether they are deductible as a business expense or not?

A. That is by far the most common. I would say ninety-nine per cent of all cases are handled that way.

Q. I assume perhaps this debate about long-term or short-term capital gains is ordinarily handled that way, is it not?

A. That is correct.

Q. Although there is law on that subject?

A. There is law on that subject.

Q. Now, Mr. Moser—and if your Honor please, this is without conceding this is a proper issue in the case. When he asks about depreciation I feel I am forced to do so by virtue of the evidence which has been admitted in the case, although I don't retract from my original position that it was not proper.

Mr. Moser, have you—if you folks want to keep them [422] awhile, fine; if not, you can pass them up here and they will be available for your inspection any time you want them. We will keep them in Court.

Have you prepared a schedule of depreciation?

A. I have.

Q. And will you produce that, please, sir?

(Document handed to counsel.)

Mr. Parker: May this Exhibit be marked for identification?

The Court: At this time, ladies and gentlemen,

(Testimony of R. Dale Moser.)

we will take the afternoon recess for about ten minutes.

(Recess.)

(Defendant's Exhibit H marked for identification.)

Q. (By Mr. Parker): Mr. Moser, before going to the Exhibit which has just been marked——

The Clerk: Defendant's Exhibit H for identification.

Q. ——there are at least a couple of questions I forgot to ask you about the net worth statement. First I wanted to know whether or not in arriving at that net worth statement you made any allowance at all for gifts to clients?

A. No; I did not.

Q. Secondly I would like to know whether or not it is in accord with sound tax accounting practice to charge off a stolen car where the insurance company has refused to pay or denied [423] liability——

Mr. Royston: I object to that as this man's conclusion on a matter of law.

The Court: May I have the question, please?

Mr. Parker: I hadn't finished the question.

Mr. Royston: Excuse me. I withdraw my objection.

Q. (By Mr. Parker): And then upon recovery to report the net recovery as income and pay tax on it?

(Testimony of R. Dale Moser.)

Mr. Roylston: Then I make the objection as stated before.

The Court: Objection sustained as to that.

Q. (By Mr. Parker): I will put this question to you, Mr. Moser: In the course of your audit did you find that Dr. Lutfy did recover a judgment against the insurance company arising out of the theft of that Lincoln Continental automobile?

A. I did.

Q. And did you find in the course of your audit that upon recovering that judgment for the theft of that automobile reported it as income at a later——

Mr. Roylston: I object—maybe I interrupted too soon again.

Q. (Continuing): ——on a tax return for the year on which he made the recovery?

Mr. Roylston: I object unless the year is given. If they give the year then I have no objection.

Mr. Parker: I am not absolute as to the year. What year was it that he reported—— [424]

A. The year 1950.

Mr. Parker: Does that satisfy your objection?

Mr. Roylston: Yes, sir.

Q. (By Mr. Parker): Did he report it as income and pay tax on the recovery for that stolen automobile in the year 1950? A. He did.

Q. Is there anything unusual from an accounting point of view about his charging off when stolen and reporting it back as income when he recovered on it? Is that objectionable to you?

(Testimony of R. Dale Moser.)

Mr. Royston: I object to that on the ground it is calling for a conclusion of this witness.

Mr. Parker: I submit the witness is an expert.

The Court: He may answer that.

Q. (By Mr. Parker): Is there anything unusual about that?

A. Under the particular circumstances, no.

Q. Mr. Moser, directing your attention to defendant's Exhibit H for identification, what is this?

A. This is a schedule of fixed assets and depreciation for the three separate pages for the calendar years 1946, 1947 and 1948.

Q. And did you prepare that? A. I did.

Q. And from what source did you derive your base figures [425] for computing depreciation?

A. From the Government's allegations as contained in Exhibit 33.

Mr. Parker: I offer the Exhibit in evidence subject to the explanation I am going to ask the witness for.

Mr. Royston: No objection.

The Court: It may be admitted.

(Defendant's Exhibit H marked in evidence.)

Q. (By Mr. Parker): Mr. Moser, do you have copies for the Jury, the Judge and counsel?

A. Yes, I do.

Q. Mr. Moser, before going into a discussion of Exhibit H and the figures on it I want to ask you to explain briefly to the Jury what this depreciation business is?

(Testimony of R. Dale Moser.)

A. Depreciation is the wasting away of a capital asset. It may be an automobile or a building. It wastes away and deteriorates over time and use. That is a short definition.

Q. Is that a proper deduction for income tax purposes?

A. Yes, sir; it is stated in the Code it is proper to make a deduction for depreciation.

Q. Is there any particular method specified in the Internal Revenue Code for figuring depreciation?

A. No. The regulations state that the capital sum may be determined over equal annual installments or any other commonly accepted method such as production hours method. [426]

Q. I see. Now, Mr. Moser, I observe from Exhibit H that you have a column, "Estimated Life Years"; what does that mean?

A. That means the estimated life at which that asset will have a useful value.

Q. You have a column called "Straight Line Depreciation"; what is that?

A. Straight line depreciation is the method most commonly used for the principal reason it is most commonly used is because of its simplicity, that is a straight deduction of an equal annual amount.

Q. Can you give us an example, just a hypothetical example to illustrate that?

A. We will take an automobile which has a life of four years; you take one-fourth of the cost of the automobile in each year.

(Testimony of R. Dale Moser.)

Q. We are assuming you are using that automobile in your business? A. That is correct.

Q. In other words, you deduct each year for depreciation twenty-five per cent of the cost of that automobile? A. That is correct.

Q. Now, you have a column here called the "Sum of the Digits Depreciation," and is that capable of being explained or not?

A. I believe it can be explained. It is a little bit [427] more technical than the straight line. Sum of the digits method is used by many businesses because they want to equalize the cost of that particular asset over its life rather than recover its cost. By that I mean the asset, such as an automobile, as we all know, depreciates in value to a greater extent the first year and each succeeding year the depreciation is less on a resale value, on the replacement value of that particular asset. Again, an asset which is new requires far less repairs than an asset which is old. The older the asset the more repairs; and by this method the business is able to more equally equalize the cost of using that asset through depreciation and repairs over the entire life.

Q. Are both of these methods of computing depreciation, both the straight line and the sum of the digits, are both of those standard, accepted, widely used methods of computing depreciation?

A. They are.

Q. You are aware there has been recently a complete revision of the income tax laws?

(Testimony of R. Dale Moser.)

A. Yes.

Q. And with respect to depreciation a liberalization of especially the first few years?

A. That is correct.

Q. Do I understand correctly this sum of the digits is on the same principal it allows more depreciation for the early [428] life of the asset?

A. That is correct. I can explain that a little more fully if it is agreeable to both counsel.

Q. It is agreeable with me.

Mr. Royston: That is all right with me.

Mr. Parker: I am sure Mr. Royston will stop you if it becomes disagreeable.

A. In the sum of the digits method, we will take a simple four-year asset. Take for each year, first year one and second year two, third year three and fourth year four. You add those up, which comes to the total of ten. In depreciating you use that ten as the denominator and the numerator would be the year you are taking in reverse. In other words, the first year instead of taking one-tenth of the cost you take four-tenths of the cost; the second year you take three-tenths of the cost and the third year you take two-tenths of and the last year one-tenth of the cost. That is a simple illustration of what the sum of the digits method is. That method has been allowed in income tax deductions. The regulations do not state any limitation. However, the Bureau has a rule of thumb in coming to an agreement in differences of opinion;

(Testimony of R. Dale Moser.)

has used a figure of one hundred fifty per cent of straight line depreciation, they would accept up to one hundred fifty per cent, but not over one hundred fifty per cent. Under the new law it is definitely stated in the new law they [429] will accept up to two hundred per cent.

Q. Is this sum of the digits method of computing depreciation, is that regularly accepted by the Bureau of Internal Revenue? A. Oh, yes.

Q. All right now, Mr. Moser, I guess that takes care of the preliminaries as best I can do it. Will you now turn to this Exhibit H and I believe you said your cost figures here, you accepted the Government's contentions? A. That is correct.

Q. Accepted their figures?

A. That is correct.

Q. You are not at the moment quarreling with those figures? A. Not at this time.

Q. All right. Will you explain your—

A. We have taken the cost, the date acquired, then the cost, the estimated life of the asset, then we have shown for the purposes of allowances a straight line depreciation on that asset by dividing it equally among the years of the estimated life of the asset. Then we have shown the depreciation under the sum of the digits method, which we take the inverse year first. On the next column the allowable depreciation where the sum of the digits depreciation exceeds one hundred fifty per cent of the straight line depreciation we have taken one hundred fifty per cent of the straight line [430] depreciation

(Testimony of R. Dale Moser.)

which is you might call a rule of the thumb of the Revenue Department they are allowing. Under that method you will notice that the depreciation for the buildings and the furniture, buildings, \$1,610.08; the furniture, \$1,048.98. Then we come to the automobiles. We have a total allowable depreciation of \$855.63. However, at that time the doctor had only one automobile at the time and we took only eighty per cent of the allowable depreciation in that year based upon Mr. Whitsett's testimony as to his computation in allowing in his reserve. We come to a total of allowable depreciation of \$3,335.56 which the doctor could have claimed on his return, and he actually claimed \$3,215. In other words, he could have claimed \$120.56 more depreciation than he actually did and still would have been allowable by the Government.

Q. There was one point I wanted to ask you about. As I recall, Dr. Lutfy, in computing depreciation on his return on the office building took a two per cent rate, do you remember that?

A. That is correct, he did.

Q. Is a two per cent rate on a building—I assume you have seen the building?

A. I have.

Q. You know its general characteristics. Is a two per cent rate on that type building an adequate depreciation in your judgment? [431]

Mr. Royston: I object——

Mr. Parker: Well——

Mr. Royston: It is a matter what the taxpayer

(Testimony of R. Dale Moser.)

claimed as the life of the building and that is already in evidence. Whether it is adequate or not is just this man's opinion and that is not what he is an expert in.

Mr. Parker: I will withdraw the question if counsel finds it objectionable.

Q. (By Mr. Parker): In other words, the result of your computation in accordance with these standards which you have described, and taking the gentleman's own figures for it——

A. May I state, Mr. Parker, why I used this life years in my computation?

Q. Yes.

A. Would that be objectionable, Mr. Roylston?

Mr. Parker: I don't think so. Will you state that, Mr. Moser?

Mr. Roylston: First, I haven't followed—it seems to me now he has changed the life expectancy of the property which the taxpayer had a different life expectancy listed. If that is what it amounted to, of course, I object to that.

The Court: He has offered now to explain why he used the basis he has.

Mr. Roylston: Which I think he said was a different basis than what the taxpayer used. [432]

The Court: It might be.

Mr. Parker: Mr. Whitsett's was different, too.

Mr. Roylston: No; the Government used the same basis on the depreciation, as I understand it. Go ahead, maybe I don't understand enough of

(Testimony of R. Dale Moser.)

what he is talking about. I will withdraw that objection.

The Witness: There has been changes made in buildings and improvements over what was reported on the return for automobiles. Automobiles were changed because of the fact four years is the usual life used in most cases. There are many more cases I believe used in three-year life than five. I believe the doctor claimed five, but I believe three is more equitable life to use on an automobile and I think you will find it is the most usual figure used. The items of the building have been changed because in the first week of June of this year at my office in conference with Mr. Tucker, Mr. Whitsett and Mr. Calkins, we discussed this matter quite thoroughly and the four of us agreed the term of twenty years should be equitable for these buildings. That is the reason I used that figure.

Q. All right, Mr. Moser, will you go to the second page of the Exhibit H?

A. The second page again similar to the first page of the Exhibit. I think it will be necessary to go through item by item but only to show the amount allowable of building, [433] \$2,485.71. For furniture and fixtures, 1,353.20. For automobiles, 1,165.84. And you will notice in that computation that eighty per cent of the Ford was used a portion of the time and the Mercury was not used at all, using only the full amount when he had more than one car. And the total of that figure for automobiles is \$1,165.84. Making a total allowable deprecia-

(Testimony of R. Dale Moser.)

tion of \$5,004.75. And the doctor claimed on his return \$3,702.50. In other words, he could have claimed 1,302, \$1,302.25 more than he actually claimed.

Q. Will you do the same for the third page?

A. On the third page for the calendar year 1948 we have the same type of Exhibit which shows \$3,131.36 allowable for buildings. \$1,486.08 allowable for furniture and fixtures and equipment; and \$1,162.24 allowable for automobiles. Making a total allowable of \$5,779.68. And the doctor claimed on his return \$4,442.88. He could have claimed an additional \$1,331.80 more than he actually claimed on his return.

Q. In other words, if I understand you correctly, in each of the three years the depreciation which he claimed on his return as a deduction was substantially less than the allowable depreciation which he could have claimed and received a deduction and credit for?

A. That is correct.

Q. And in '47 and '48 those two years lumped together amounted to over \$2,600 in those [434] years?

A. I believe that would be so.

Q. All right, Mr. Moser, I think that is all the questions I have about that matter. Now, Mr. Moser, a few general questions here. In connection with your examination of Dr. Lutfy's records did you undertake to get some idea of the number of transactions involving cash or charge that went through his office each year as disclosed by the daily doctor's daily log books that you examined?

(Testimony of R. Dale Moser.)

A. Yes, I did.

Q. And what kind of transactions were you particularly interested in ascertaining?

A. In the number of transactions in which he received cash either as cash payment for a call or received on account.

Q. First I will ask you before you give that number, have you found, as a matter of experience as an accountant, that inadvertencies or errors or mistakes bear some relationship to the total number of transactions involved? A. Yes, I have.

Q. How many cash transactions did you find recorded there for 1946?

A. 1946, I found there were 2,382 cash transactions.

Q. 2,382? A. That is correct.

Q. And for '47?

A. Found there was 2,955 cash [435] transactions.

Q. 2,955, and 1,948? A. 3,891.

Q. You remember Mrs. Raye Way, the wife of the Justice of the Peace at Williams who testified here as a witness? A. Yes.

Q. I believe she testified she went to work for Dr. Lutfy the day after Labor Day of 1947?

A. That is correct.

Q. And worked for him until the Spring of '49?

A. That is right.

Q. Did you find any improvement in the overall accuracy of the records as between the period before she came to work as compared with after

(Testimony of R. Dale Moser.)

she came to work? A. Yes, I did.

Q. And was it better or more complete and accurate after Mrs. Way?

A. It was more accurate after she came to work.

Q. Now, Mr. Moser, in the course of this period of time that you have been engaged in this matter have you had occasion to confer more than once with Mr. Tucker, Mr. Whitsett, Mr. Cass or other members of the Internal Revenue Department?

A. Yes, I have.

Q. Can you tell the Jury in a general way about how often such conferences occurred or describe them or give us some idea how much time you have spent with them? [436]

A. Well, the first conference I had with either of the gentlemen mentioned was right at the end of 1951 or the first part of 1952; it was a conference with Mr. Cass in the Judicial Department at his Los Angeles office. Dr. Lutfy and myself and Mr. Treadaway from our firm and Mr. Cass were the men present at that particular conference. After coming back to Phoenix, I had a conference with Mr. Tucker, I believe was there, and Mr. Whitsett, which we discussed the case and certain information was given them which had been requested by Mr. Cass at the previous conference.

Q. By the way, if I may interrupt at this point, during the period of these conferences did you have a substantial part of Dr. Lutfy's records in your possession? A. Yes, I did.

Q. And did you at all of these conferences give

(Testimony of R. Dale Moser.)

these gentlemen all of the information you were able to find and which they requested?

A. Yes, I did.

Q. Did you at any time ever try to withhold from them any information or any document or any record or any cancelled check or any other part of Dr. Lutfy's records?

A. No, I did not.

Q. And did you at all of these conferences where these matters were discussed discuss freely and accurately the matters which were under [437] consideration? A. Yes, I did.

Q. State whether or not it is true that after I came into the case that I advised you to continue to do that? A. Yes, you did.

Q. I don't remember just where we were when we left off——

A. I believe at that time I just said we had a conference with Mr. Whitsett and Mr. Tucker after our first interview with Mr. Cass. I then had another interview in January, 1952, with Mr. Cass in Los Angeles. The next interview I had was with Mr. Whitsett and Mr. Tucker and Mr. Calkins in June of this year, which I believe occupied a good portion of two or three days at different times when they would come in and spend two or three hours at a time I believe on three successive days, possibly only two. I wouldn't swear to that. I believe Mr. Tucker was not present except on one occasion, is that right, Mr. Tucker?

Mr. Royston: Yes, that is right.

(Testimony of R. Dale Moser.)

The Witness: That is the conferences I have had as far as I can recollect them.

Q. (By Mr. Parker): When you went to Los Angeles, when did you say you and Dr. Lutfy made the trip over there?

A. The first trip when Dr. Lutfy went with me it was either the latter part of December, 1951, or the first part of January.

Q. And did you have some sort of hearing? [438]

A. Yes; we had a preliminary hearing at the Judicial Department.

Q. Who conducted this? A. Mr. Cass.

Q. And that gentleman, I believe, has been identified as the Regional Attorney at Los Angeles?

A. I believe that is correct.

Q. Did Dr. Lutfy answer all of his questions?

A. Yes, he did.

Q. And did you supply information to him?

A. Yes, I did.

Q. Did you take the records over there?

A. Yes; we took almost all of his records there.

Q. At the conclusion of that hearing did Mr. Cass express an opinion about what he thought of this case as——

Mr. Royston: Well, I am going to object to that. I don't have any idea what it is, but I object to it.

The Court: Objection sustained.

Mr. Parker: I am sorry Mr. Royston objected, but I suppose it is objectionable.

Mr. Royston: I still haven't followed all this

(Testimony of R. Dale Moser.)

hearing, whatever he is talking about. I think it should be made clear it had nothing to do with this action here. It has been referred to as a preliminary hearing.

The Court: I sustained your objection, Mr. [439] Royston.

Mr. Parker: I would be delighted to tell him all about it.

Mr. Royston: I was confused. I thought he called it a preliminary hearing. I just thought if it wasn't a preliminary hearing maybe all of it is subject to being stricken. I thought for awhile this was a preliminary hearing in this case. Of course I wasn't at a preliminary hearing either. I don't know whether there was or not.

Mr. Parker: It wasn't a particular part of this proceedings in this Court.

Mr. Royston: I will withdraw that objection. You can go on.

Mr. Parker: You want him to go ahead and tell about that?

Mr. Royston: I don't care. If it wasn't a preliminary hearing in this case I don't think it is relevant.

The Court: Where we are right now you made an objection to one question and I sustained it.

Mr. Royston: All right, sir.

Mr. Parker: Do I understand counsel withdraws the objection?

Mr. Royston: He ruled on it.

(Testimony of R. Dale Moser.)

Mr. Parker: Did I understand you to say to go ahead?

Mr. Royston: Go ahead, whatever you want to do.

Mr. Parker: Have him tell about it? [440]

Mr. Royston: If it is not a preliminary hearing in this case I am objecting to anything further concerning that. I thought for awhile it was a preliminary hearing, evidently it wasn't a preliminary hearing, it was some conference over on the Coast.

Mr. Parker: We will forebear.

Q. (By Mr. Parker): Mr. Moser, in the course of checking and auditing Dr. Lutfy's books and records, his bank accounts, his deposits, his expenditures, did you find at any time any concealed bank accounts? A. No, I did not.

Q. Did you find any bank accounts belonging to him or his wife in any fictitious name other than the nickname Tiny Lutfy? A. I did.

Q. How was that, sir? A. I did.

Q. Which is that?

A. Phoenix Sports Shop.

Q. You audited that account?

A. I examined it, I didn't audit.

Q. That was the account of 500 that eventually played out to \$35 and was closed?

A. That is correct.

Q. Did you find at any point anything to indicate any [441] desire to hide any money or property or assets from the Government?

A. No, I did not.

(Testimony of R. Dale Moser.)

Q. Did you find any indication of any disposition to keep a double set of books?

A. No, I did not.

Q. Did you find any indication of any transactions recorded in any code or any false description of it?

Mr. Royston: If it please the Court, the Government hasn't alleged any of these items of misconduct such as double books or coded documents. There has been no allegation of anything along that line was kept by the taxpayer.

Mr. Parker: If your Honor please, we are charged with a pretty serious offense of wilfulness and intent is a part of one of the essential elements which the Government has to prove and I feel we should not be limited.

The Court: I will permit him to answer this question.

(The last question was read.)

A. No, I did not.

Q. As far as your observation of these conferences at which Dr. Lutfy and yourself had with the various members of the Internal Revenue Department, did Dr. Lutfy co-operate with them and undertake to supply them with what they asked for?

A. In every way.

Q. Now, Mr. Moser, there was introduced by the Government [442] here an application for a loan from the Northwestern Mutual Life Insurance Company. Exhibit 32, was it?

(Testimony of R. Dale Moser.)

Mr. Royston: I believe so.

Q. Government's Exhibit 32 in evidence, I show that to you and direct your attention to the line there that says, "From salary, professional fees, per month, \$1,665 net." A. Yes, sir.

Q. Did you observe that? A. Yes, I do.

Q. That application I think was dated—what date was it dated?

A. It was dated the 26th day of May, 1948.

Q. Are you able to tell the Court and Jury how far off that is from the actual income?

A. I believe I can explain that to them. This application states that he estimates his professional fees, his income from professional fees to be \$1,665 per month.

Mr. Royston: I object to the witness inserting the word "estimate." There is no such word as "estimate" there. It calls for monthly salary——

Mr. Parker: I believe there was testimony from the Government's witness it was an estimate.

Mr. Royston: This witness purportedly was reading from the document.

The Court: The Exhibit itself should be [443] read.

Q. (By Mr. Parker): Whatever the Exhibit says, Mr. Moser.

A. The portion says: "My income is as follows: From salary, professional fees, \$1,665 per month net." \$1,665 per month net would be a total for the year, for twelve months, \$19,980. The doctor reported on his income tax return for the year 1948,

(Testimony of R. Dale Moser.)

the sum, gross income of \$37,105.29 and a net income of \$16,927.37. Now, to this net income we must add back the non-cash expenditures of depreciation of \$3,600 which brings a return, net return for that year as reported on his tax return of \$20,527.37, almost \$600 more than the amount which he showed on his appraisal.

Q. Thank you, Mr. Moser. Now, Mr. Moser, in auditing the doctor's books and records, did you find charges from Coulter's? A. Yes, I did.

Q. What is the name of that firm?

A. The name? Q. Yes.

A. It is Coulter's. It is an automobile firm in Phoenix.

Q. It is Coulter Motor Company?

A. Coulter Motor Company.

Q. Commonly referred to as Coulter's?

A. That is correct.

Q. I will ask you whether or not the doctor had his cars, car or cars, at least partially maintained at Coulter's? [444] A. Yes, he did.

Q. There is a check that has been talked about to some extent in the amount of \$283.05. Is that the check? A. That is the check.

Mr. Parker: May this be marked for identification?

(Defendant's Exhibit I marked for identification.)

Mr. Parker: Do you have any objection of it being offered in evidence?

(Testimony of R. Dale Moser.)

Mr. Royston: No objection.

The Court: It may be admitted.

(Defendant's Exhibit I marked in evidence.)

Q. (By Mr. Parker): Now, Mr. Moser, do you remember if there were checks to Coulter's?

A. Yes, there was.

Q. Now, this particular check was charged to what?

A. This particular check was charged to automobile expense.

Q. And the check as disclosed by the endorsement was actually paid to whom?

A. Coles Home Furnishings.

Q. According to your investigation of the books, if this had been Coulter's, it would be in all likelihood have been what?

A. A repair bill at Coulter's Garage, Coulter Motor Company.

Q. (By Mr. Parker): Would the Jury like to pass this Exhibit among you? [445]

Q. (By Mr. Parker): There is one other question I would like to ask you and that is whether or not on a check such as this it would make any difference at all income-tax-wise if the merchandise was returned and the amount refunded at a later date, or from a net worth point of view?

A. No, it would not from a net worth point of view.

Q. There was a stipulation here regarding pay-

(Testimony of R. Dale Moser.)

ment of some small sums to the Arizona Country Club? A. That is correct.

Q. Mr. Moser, do you happen to belong to that club, which has been described as a "poor man's country club"? A. Yes, I do.

Q. Do you consider that an apt description?

A. I think it is fairly apt, yes.

Q. Mr. Moser, what is the customary practice with respect to how dues of that character are treated for income tax purposes?

A. I believe in the great majority of cases they are taken as a business expense.

Q. Now, in your own firm, how are your dues handled?

A. My firm pays my dues and take it as an expense.

Mr. Royston: I object. The difference between a physician spending it for his business and an accounting firm spending it for their business, because an accounting firm might claim it as an expenditure doesn't necessarily mean it is [446] a regular business expense for a physician. In other words, if an accounting firm goes on the golf course to find their clients it is one thing; if a doctor goes there to find his clients it is altogether different.

Mr. Parker: May I make this comment, your Honor. There is a terrific difference. A doctor or lawyer can't advertise; an accounting firm can. The only way a doctor or lawyer can stimulate business is such means as this. So there is a much stronger reason why a doctor or lawyer should be able to

(Testimony of R. Dale Moser.)

legitimately take that kind of a deduction than there is even in the case of an accounting or business firm.

The Court: There have been some observations made but there has been no objection.

Mr. Roylston: I was objecting to any further testimony how this man claims his country club membership as an accountant, because it doesn't tend to prove anything about the doctor.

The Court: The objection will be overruled.

Q. (By Mr. Parker): Mr. Moser, did Dr. Lutfy claim the country club dues? A. Yes, he did.

Q. And was that, in your opinion, in accordance with sound tax accounting practice?

A. Yes, it was. [447]

* * *

Cross-Examination

By Mr. Roylston:

Mr. Roylston: If it please the Court, I am passing out these copies of defendant's Exhibit G to the Jury, which are the same ones we talked about yesterday.

Q. (By Mr. Roylston): Referring to this defendant's Exhibit G, Mr. Moser, the first item I want to question you about is on the 1945 through 1946 sheet, that is the first sheet on the Exhibit?

A. Yes, sir.

Q. And under the column Funds Available as Alleged and Reported, there is an item about half way down the column that shows \$12,818.88. I

(Testimony of R. Dale Moser.)

wonder if you would explain that [452] particular item?

A. That item is the net proceeds received by the doctor on the sale of the property known as the Cable Trust property.

Q. Now, would you divide that up into what is principal and interest on that amount, do you have that figure available?

A. No, I don't have that figure available. That is the sales price. That does not include any interest, as I recall.

Q. Wasn't the receipt price from that particular piece of property \$12,520.33?

A. I believe there was a small item prior to the main item which amounted to, brought the total to \$12,818.88.

Q. Do you know what that item would have been?

A. I could go back through my work papers and determine. The sales price was \$40,000, which one-third of it would have been \$15,330, less the cost of sales, bringing \$12,818.88.

Q. That prior item, would that have been expenses?

A. Possibly would be part of the earnest money, I am not sure.

Q. Do you have your work sheet here?

A. I don't have a recap of all those deposits here. I have it, I believe, at the hotel.

Q. According to the information which we have

(Testimony of R. Dale Moser.)

the purchase price, as far as Dr. Lutfy's share is concerned, is \$12,520.33?

A. The escrow statement that I saw I believe the price I computed his share to be \$12,818.88. There might be a [453] difference of what was expense and what was part of the price between your interpretation and mine; I believe that would be it.

Q. You think you could find that later in your work papers? A. I believe so.

Q. In that same column on down a few items further in the column you have an item of \$251.12 which is listed as a refund from Mehagians?

A. Yes, I put that in because he did receive a check from Mehagians in that amount. And I searched his expenses claim for 1951 and his check records and I could not find where he had paid out of his funds available in that period the amount of \$251.12. It must have come from some other period, a prior period. It was the first part of the year in which he received that refund.

Q. This Mehagians refund I believe was on November 6th of 1946. Can you check your records for that?

A. I can check them. I don't have them in the courtroom; I can check them.

Mr. Royston: If it please the Court, probably all this examination is kind of a waste of time if we don't have the records to go into, I will have to go back over it later.

The Witness: Yes, I believe that was October that particular deposit was made, but there was one

(Testimony of R. Dale Moser.)

check written— [454] I could ascertain any expenditures made from his personal funds by check.

Q. (By Mr. Royston): Let me ask you this question, Mr. Moser. If this refund which was received during 1946 was listed in this second column as funds available, if the expenditure had been made during 1946 shouldn't that have been listed under the third column?

A. That is correct, but as I stated, I have listed all the expenditures for the year and I do not find that expenditure for that year. That is the reason I quoted it there.

Q. This Mehagians, that is a furniture store there in Phoenix? A. That is correct.

Q. Isn't it highly unlikely if the expenditure hadn't been made in '46 that Dr. Lutfy could not have held this particular item for a period of some years and returned it for refund?

A. It could be or could be a return of merchandise at a used price, that I do not know. All I know I cannot find any records among his checks for the year 1946 in which he paid that amount in '46. I can't call it an expenditure when I can't find a check for it.

Q. You listed this in funds available and still did not put it under expenditures?

A. That is right because I found it under funds available [455] but I did not find it under funds expended.

Q. The way it is listed here it is to the taxpayer's advantage, Dr. Lutfy's advantage, is that

(Testimony of R. Dale Moser.)

correct? A. That is correct.

Q. Just the next item down, collection of loan—Marsh, you have got \$288.12. Now, that collection of that loan was in November, 1946, is that correct?

A. I will check with you. I think I have that here. Yes, that was November, 1946.

Q. On your work sheet do you have the date that loan was made?

A. No, I do not. I could not find any indication that any money had been expended for that purpose.

Q. So if that loan was made during the year 1946 it should have shown under the expenditure column, the third column?

A. That is correct. But it was not in, as far as I could determine, in the expenditures for that period. I also find in connection with that there was some small payments made by Marsh in April and in—the total amounted to \$288.12, so there were some payments made through the year. One payment I see here made in April.

Q. Well, now this particular item being listed in the second column and if the expenditure was made in the same year you state you have no evidence to state when the expenditure [456] was made?

A. That is correct, I cannot find there was any expenditure made during the year for that particular item.

Q. The manner in which that item is listed is also to the taxpayer's advantage?

(Testimony of R. Dale Moser.)

A. That is correct. Those were funds which were available.

Q. Now, in that same column, skipping back up a couple of lines, there is an item \$766.26?

A. Yes, sir.

Q. Listed as Sale of Personal Assets?

A. That is correct.

Q. Now, included in that amount did you find a figure of \$250 for the sale of a rifle and telescope on February 25th, 1946?

A. Yes, I did. I believe I will have to check, but I did find the items which comprised that. What was the amount that you had?

Q. \$250 for the rifle and telescope, on February 25th, 1946. A. Yes, I did find that.

Q. And for the sale of a shotgun for \$125 on March 27th of 1946, making the total of \$375?

A. That is correct.

Q. Now, does your records show when Dr. Lutfy made the expenditure for those particular items? [457]

A. Not identified by items, but the expenditures he made in 1946 for guns are included in the expenditures in the third column, so it would make no difference. We have charged him with expenditures for all the guns he purchased during that year and we are taking the funds available, the amount he received for those guns.

Q. Where is that item in the third column?

A. It is included either in the item of professional business expenses or in personal expenses by

(Testimony of R. Dale Moser.)

check. If he spent any money for the gun that he sold it would be in that item, in either one of those two items.

Q. Did you find a personal check or personal expense by check to cover those two items? Did you find that in the records anywhere?

A. I found he had purchased some guns, not necessarily guns, but scopes. I don't know whether he purchased these two items or not. I could not identify what he sold with what he purchased, no.

Q. You didn't find checks to cover these two specific items? A. Not specific items.

Q. The manner in which that is listed as funds available, then being unable to place it under the third column, is that to the taxpayer's advantage?

A. I do not think so because all the funds which he has [458] paid out during the year, if he purchased these guns during the year they are included in the expenditures.

Q. Business expenditures?

A. Or personal.

Q. I believe you stated you did not find a check to cover them under personal expenditures?

A. I could not identify any particular gun which he might have sold by check which he wrote. I stated that the expenditures he made during 1946 for any guns or anything of that type are included in the total expenditures which are charged against the doctor in this Exhibit.

Q. What was the total amount of those guns and rifle expenditures, according to your computation?

(Testimony of R. Dale Moser.)

A. I have not computed that.

Q. All right, sir, now moving over into this column Expenditures as Alleged and Claimed Plus Cash End of Year, the third column on this same page?

A. Yes, sir.

Q. Going down to the item almost to the bottom of the page, the first item in parentheses, \$2,384.33, would you explain again just what that particular item is?

A. That particular item consists of items, several items, which it was alleged upon the Government's net worth statement were capital items which had been included in the expenses.

Q. This particular column also refers to the items as [459] claimed on Dr. Lutfy's returns, do they not?

A. That is correct.

Q. You say that is correct?

A. That is correct.

Q. Now, Mr. Moser, isn't it true that this amount of \$2,384.33 was included according to Dr. Lutfy's returns in this item of \$19,037.76 which is listed as Professional and Rental Expenses Claimed?

A. That is correct.

Q. Isn't it true according to Dr. Lutfy's return this same item of \$2,384.33 was listed up higher or was included up higher in this same column under capital assets as depreciation?

A. No, that item was not as an item included.

Q. Well now, examine this '48 return, Mr. Moser, Government's Exhibit 5, and turn to the

(Testimony of R. Dale Moser.)

depreciation schedule in that particular return and locate the claimed expenditures for capitalized items?

A. Claimed expenditures for capitalized items are not included in this return.

Q. What was the cost basis which Dr. Lutfy claimed for the items purchased in 1946?

A. A round figure in each instance with the exception of furniture on the bottom line, was a round figure to the thousands of dollars, did not include the list of any items at all. [460]

Q. Read the figures which were included off of that return.

A. Medical equipment, \$13,000; X-ray equipment, \$7,000; clinical photo equipment, \$2,000; Mercury Convertible, \$3,000; office building, \$30,000; additional office, \$20,000; frame stucco, \$5,500; brick stucco house, \$5,000; additional remodeling, \$5,000; concrete block duplex, \$20,000; furniture, \$3,357.50.

Q. According to that return those particular amounts were claimed by the doctor for the purposes of depreciation, weren't they?

A. These amounts here were claimed.

Q. Those amounts there. Wouldn't that necessarily include that figure of \$2,384.33?

A. Not necessarily. Some of the items included in there are some of the items which are alleged by the Government to be capital expenditures which are not necessarily capital expenditures. That could only be determined upon an examination of each item.

(Testimony of R. Dale Moser.)

Q. According to the return wasn't Dr. Lutfy claiming them at a cost of even more than what the Government was stating?

A. That I can't say. He has a net figure here. He has not itemized the items. I do not know what he claimed any specific item for which you are speaking about now. [461]

Q. The total assets, weren't the total assets claimed at a greater figure than the amount stipulated to?

A. I don't believe there was an amount stipulated, I believe there was an amount alleged in which we have used your figures, but I don't believe they were stipulated to.

Q. Weren't there stipulations as to the individual assets?

A. Certain individual assets, yes.

Q. Didn't those stipulations include these particular pieces of property?

A. Certain pieces of property, yes.

Q. Didn't it include all of those pieces of property claimed there?

A. The pieces of property, yes, it included the purchase price of the property.

Q. Didn't Dr. Lutfy for the purposes of depreciation list the cost of the properties in excess of the amounts which now have been stipulated to?

A. Yes, he did.

Q. Well, then wouldn't that necessarily include this figure of \$2,384.33?

A. Again I will have to say not necessarily.

(Testimony of R. Dale Moser.)

Q. You say not necessarily. Does it or doesn't it?

A. I say not necessarily. I cannot say what the doctor had in his mind because there is no computation. I say the expense items which you claim are capital assets, I assume he [462] did not include those in these figures. As I stated, these figures are round figures, \$20,000, \$5,000, which are listed on the return.

Q. Wasn't it by the use of this figure \$2,383.33 that you finally agreed to stipulate to these amounts which are up here higher in the column?

A. We stipulated to the fact that he spent that money; we didn't stipulate to the fact that was in addition to capital assets. We stipulated he spent those definite amounts and we could not include the expenditure twice from the doctor's records.

Q. Mr. Moser, don't you know for a fact that according to the doctor's returns that item of \$2,384.33 was claimed under the depreciation schedule and was also claimed under business expenses, and that in your computation you included it only once, which makes it balance out, isn't that correct?

A. I included it in my computation—I think if we want to go to the depreciation schedule we could explain this matter a little better, which will probably come later. I have included in my computation here only the expenditures made. I am not including in this computation here whether the expenditures were personal, professional expenses or whether they were capital assets. I have used them as capital assets in order to agree with

(Testimony of R. Dale Moser.)

the information as presented by your schedule which you presented in Court in order to tie [463] into your figures. I cannot charge the doctor with an expenditure for capital asset and again charge him with an expenditure for an expense.

Q. That is the point I am getting at. According to accounting procedure you can't do that, but according to those returns that is exactly what Dr. Lutfy did, isn't that correct?

A. Again I will have to say I do not know whether the doctor included in his computation of arriving at this price those figures or whether he did not, because there is no evidence available to that fact.

Q. You know this is the way it should have been done, the way you did it?

A. No, I would not say that is entirely correct. I would not say all those items are capital items. I will not agree to that.

Q. Are part of them capital items?

A. A part of them should be capital items.

Q. So if they are capital items and they are included up there as capital items by Dr. Lutfy and if they are also claimed as a business expenditure, doesn't that amount to a double deduction?

A. They are not included up there by Dr. Lutfy. That is my computation to agree with your expenditure. I do not know what the doctor had in mind when he included these.

Q. That is the point I am getting at. According to your [464] figures they are not included up

(Testimony of R. Dale Moser.)

there, but according to the doctor's computation they were, so according to your figures you are claiming a single deduction; according to Dr. Lutfy's return he is claiming a double deduction, isn't that what it amounts to?

A. I cannot say that is a true statement.

Q. You can't say it is an untrue statement?

A. I can only say I do not know what the doctor included in these figures. There is no computation available to show what he included to arrive at these figures. I do not know if these items are in there or if they are not in there.

Q. Then why did you take them out, Mr. Moser?

A. I took them out because those are the items which you alleged were capital expenditures.

Q. You stipulated that this was these same figures of capital assets?

A. We stipulated that the amounts were spent to the people in all of these instances. We do not stipulate they were capital expenditures or personal expenses or business expenses. We stipulated that they were——

Q. So, in other words, you tried to stipulate they were and weren't both in the same stipulation?

A. Oh, no.

Mr. Parker: If your Honor please, that is argumentative. The stipulations are in evidence. [465]

The Court: The stipulation will show what is stipulated.

Mr. Parker: I made the stipulation, not the witness.

(Testimony of R. Dale Moser.)

Q. (By Mr. Roylston): This next item down here of \$783.22, the same thing applies to that as we have been discussing of this item of \$2,384.33, isn't that correct? A. That is correct.

Q. It amounts to exactly the same thing we have been discussing?

A. Same thing. I will have to qualify that a little bit, Mr. Roylston. You will notice under the statement I have said Less: Included Above Under Professional and Rental Expenses Claimed, the item we were just discussing?

Q. Yes, sir.

A. Under the other deduction I have Less: Allowance for Items Taken as Expense. There is a little different phraseology there.

Q. What I am getting at is if this amount of \$783.22 was included in the \$4,683.09 and was also included in the \$19,037.76 it would amount to a double deduction, isn't that correct?

A. No, sir, that is not correct at all. I think I had better explain this thing a little bit further to you.

Q. Yes, sir, I wish you would.

A. At the conference I mentioned yesterday with Mr. [466] Whitsett, Mr. Tucker and Mr. Calkins we listed all of the items which they considered as personal expenses, in other words, all the expenditures by check other than what were legitimate, they considered legitimate deductions. They came up with a certain figure which we reconciled with them

(Testimony of R. Dale Moser.)

and I believe we all came in agreement that was correct. Is that right, Mr. Whitsett?

Q. Just testify, because I can't keep up hardly with you, much less both of you.

A. In those items they asked us to stipulate as expenses were certain items which we would not agree. We did agree that the total amount expended was correct; we would not agree they were all personal expenses. The figure they gave us on that particular date was different than the figure they have now. We reconciled to the figure they have on that date and included a certain amount of items which had been claimed by the doctor. In other words, if we had taken that figure without giving him credit for that he would have been charged twice for that same expense, as far as the net worth theory is concerned. Then when the new figure came up we have taken from the amount of items which were listed which have been claimed, we took the difference between that item as stipulated in your request for stipulation, the difference between that in the amount you alleged in your net worth statement, and subtracted that from the amount we had computed was [467] included in professional expense. I have a breakdown of that if you care to see it.

Q. No matter what figure the Government used you were able to reconcile it, is that what it amounts to?

A. That is correct, yes, sir.

Q. Well, now, you stated that you subtracted

(Testimony of R. Dale Moser.)

this item of \$783.22 because it had been included in some other figure there?

A. Yes, that is correct.

Q. Now, which figure do you state it was included in?

A. It was included in the figure of \$19,037.76.

Q. That is the Professional and Rental Expenses claimed?

A. That is correct.

Q. Now, wasn't it also included in the \$4,683.09 which is listed as Alleged Personal Expenses by Check?

A. That is where it was included in that amount by the Government, yes.

Q. \$783 was included in the \$4,683.09?

A. That is correct.

Q. Was also included in the \$19,037.76?

A. Now, I think you are getting the wrong interpretation.

Q. Didn't you state in answer to my first question that it was included in \$19,037.76?

A. Yes in our computation it is included in this \$19,037.76. [468]

Q. Didn't you then state it was included in the \$4,683.09?

A. It is included in the Government's amount of that, yes. That is why it cannot be charged to the doctor twice. We have to eliminate it from one place or the other.

Q. In other words, this method of your computation is the correct procedure to follow in this particular instance?

(Testimony of R. Dale Moser.)

A. In this instance in order to arrive at the expenditures the doctor made it is the only thing you can do. It has nothing to do with preparation of an income tax report.

Q. Yes.

A. In order to account for all the expenditures the doctor made we have to eliminate a double expenditure where it shows twice. You can't charge the doctor for paying a \$100 bill twice and charge it against his net worth when he only paid it once.

Q. That is what I am getting at. You did it the correct way here?

A. That is the way to eliminate the expenditure of double time. It has nothing to do with the preparation of an income tax return whatsoever.

Q. Let me ask you this next question. On Dr. Lutfy's income tax return didn't he claim this in both of these particular instances and it amounted to a double deduction?

A. Why, no, of course not. He doesn't claim a personal [469] expenditure as a deduction.

Q. Let me rephrase it. Probably my phraseology is wrong. Didn't he claim it under both of these particular items which was an unallowable deduction?

A. Oh, no, they are not an allowable.

Q. It is not allowed to be claimed twice?

A. It was never claimed twice. It never was claimed twice. It is claimed only once.

Q. Let me get to this then. Are personal expenses allowable as a deduction?

(Testimony of R. Dale Moser.)

A. That is correct, they are not.

Q. Did Dr. Lutfy claim these personal expenses as a deduction on his return?

A. There again I will have to state these are alleged to be personal expenses and in many cases they are not personal expenses. I have a list of them if you want me to put them into evidence.

Q. Let me rephrase it. The phrase "double deduction" is wrong. What I am getting at is on the return didn't Dr. Lutfy claim these personal expenditures as a deduction when it is not an allowable deduction?

A. I will have to answer that and say he did not claim these personal deductions because they are not necessarily personal deductions.

Q. But he included them in business [470] deductions?

A. I will make a statement which might satisfy you. I will say he claimed these expenditures as deductions.

Q. He claimed these expenditures as deductions?

A. That is correct.

Q. Turn over to the next page, Mr. Moser, the 1947, the one from December, 1946, to December, 1947.

Now, under Available Funds, the second column, you list a loan made by Mrs. Linsenmeyer, you list it Loan from Wife's Mother, \$3,500?

A. That is correct, sir.

Q. Where did you arrive at that figure?

A. I arrived at that figure from Dr. Lutfy.

(Testimony of R. Dale Moser.)

Q. You were present yesterday and heard Mrs. Lutfy state the loan was \$3,200?

A. I believe she stated she did not know but she thought it was about \$3,200. That was the first time I heard the figure \$3,200.

Q. Did Dr. Lutfy explain to you why he hadn't discussed this loan with the Internal Revenue men, why this loan appears here?

A. I didn't ask him.

Q. Did he have any evidence of the loan?

A. He told me what had happened, in which he had to obtain a certain amount of money in cash, that he could not do it in check, had to get a money order from Western Union in which [471] he received \$1,000 from Eddie Basha and received \$3,500 from his wife's mother and that he had never repaid the loan to his wife's mother but had repaid the loan to Eddie Basha.

Q. What I asked you, did he have any physical evidence of the loan?

A. No, he did not have any physical evidence.

Q. At the time you were discussing this with Dr. Lutfy was sometime after Mrs. Linsenmeyer's death, is that correct? A. That is correct.

Q. Now, also under that same year on down further on that same column of Funds Available as Alleged and Reported, you have the Sale of Piano, \$475? A. That is correct.

Q. Where did you obtain that figure?

A. I obtained that figure from Mrs. Lutfy.

(Testimony of R. Dale Moser.)

Q. Did Mrs. Lutfy tell you on what date she purchased the piano?

A. No, she did not. There were no expenditures in the year showing a purchase of the piano.

Q. You heard her testify yesterday she didn't recall when she purchased it?

A. That is correct.

Q. So to list this in this manner without listing an expenditure in the same year is to the taxpayer's advantage, is that correct? [472]

A. That is correct. I listed all expenditures however.

Q. Now, just for a moment going over to the right hand side of that same page, almost half way down that same page under item number 2 you have Less: Refund from Western Camera Shop, \$360.50. Will you explain what that item is?

A. It is a typographical error in the name. It is Weston's Camera Shop.

Q. Yes, sir.

A. That was the amount of a refund which the check was introduced in evidence here, that was a refund to Dr. Lutfy.

Q. Will you explain under Expenditures as Alleged and Claimed Plus Cash End of Year, if this item shows as an expenditure?

A. That is correct.

Q. Where is that item?

A. It would be—I believe it is in this same item which I have keyed in number 2.

(Testimony of R. Dale Moser.)

Q. You deducted that amount of \$360.50 from the \$19,023.79 right above it?

A. That is correct.

Q. And arrived at this figure over under the expenditure column of \$18,663.29?

A. That is correct.

Q. Will you explain why you deducted that for the purposes of your computation when the doctor claimed it on his tax return? [473]

A. I deducted it from my computation because that additional funds were available to apply against his expenses. It was the return of a purchase. The fact that the doctor claimed it on his tax return has no bearing on the fact he did receive it back and thus reduce expenses.

Q. The point I am trying to get at, the doctor claims it as a business expenditure on his tax return, then that is to the doctor's advantage, isn't that correct?

A. That is correct.

Q. And rather than leave it the way Dr. Lutfy claimed it you deducted it for the purposes of your computations so it would balance out?

A. That is correct.

Q. Then in other words, Dr. Lutfy gets the advantage of the deduction and gets the money back both, is that correct?

A. You are correct in that statement.

Q. Now, I wanted to question you concerning the sale or the purchase by Dr. Lutfy of a Ford automobile during the year 1947 when Dr. Lutfy traded in an automobile and paid a balance of

(Testimony of R. Dale Moser.)

\$760, and ask you if that shows under your expenditure column?

A. No, it does not. I don't recall—I don't know. I know he purchased a Ford automobile and paid 266.02.

Q. That was in 1946. I am talking about the year 1947, a purchase by Dr. Lutfy of an automobile by trading in another [474] automobile and paying a balance of \$760?

A. No, I have no computation of that fact.

Q. You don't show that at all?

A. I don't show that. I do not show he had an automobile he could trade in. It was not included in the alleged net worth statement at any time.

Q. This is an automobile which was purchased and sold in the same year so it would not show on that net worth statement?

A. There is no evidence of any checks being written for that amount that I could determine.

Q. So Dr. Lutfy didn't tell you about this expenditure of \$760?

A. It is not listed on his checks by which I could determine.

Q. Now, under that same expenditure column you have listed the purchase of stock in Arizona Country Club, \$500? A. That is correct.

Q. I will ask you did you include the expenditure of the initiation fee of \$100?

A. There is no initiation fee in the Arizona Country Club stock. I did not include it, no. I took the figure which you use.

(Testimony of R. Dale Moser.)

Q. Do you know why the check was made out for \$600? A. Certainly.

Q. Will you explain? [475]

A. It is the excise tax of twenty per cent on a \$500 purchase which is part of the cost. I used your cost as alleged.

Q. No matter what the item was spent for there was an expenditure of \$600 there, is that correct?

A. That is correct.

Q. And you list that as expenditure 500?

A. I list it as you listed it.

Q. On the net worth statement it is the value of the stock that shows up, isn't that correct?

A. No, on the net worth statement is what you allege the value of the stock to be. I am tying in with your alleged net worth statement.

Q. Didn't you say the value of the stock was \$500?

Mr. Parker: If your Honor please, that was proposed by the Government to which we agreed. Now counsel is attempting to impeach his own proposal and his own stipulation. I object to the procedure.

Mr. Royston: That is incorrect, the statement Mr. Parker made.

Mr. Parker: I challenge anywhere, any day.

Mr. Royston: We are here today, we can do it right now. The stipulated cost of the bond was \$500 and it is included on the net worth statement to show the worth of Dr. Lutfy as \$500. In this computation where it is balancing the [476] ex-

(Testimony of R. Dale Moser.)

penditures against the net income we have to have the total amount of the expenditures and the witness himself stated that the expenditure was \$600 so it should show as that.

The Court: The witness has answered your question, Mr. Royston. He said why he used \$500 because it was in your statement.

Q. (By Mr. Royston): And the check was for \$600, the expenditure? A. That is correct.

Q. So then according to the expenditures this amount here is \$100 off, that would throw the total off \$100?

Mr. Parker: I object to that as argumentative. He has answered that fully.

The Court: No, he may answer.

A. That is correct.

Q. Now, on the item of the purchase of the Lincoln automobile for \$5,420 you listed that as the amount of the expenditure on that item, isn't that correct? A. That is correct.

Q. I want to show you—rather than hunt it out, this letter that was introduced by the defendant yesterday shows there was an additional expenditure of \$1,000 for commissions, is that correct?

A. I don't recall that was correct, no.

Mr. Royston: I will hunt it out. If I might read a [477] part of this defendant's Exhibit F to the Jury.

The Court: Mr. Royston, you are on cross-examination now. Let's proceed on the cross-examination.

(Testimony of R. Dale Moser.)

Q. (By Mr. Royston): All right, sir. I will ask you to read that letter to yourself.

A. All right.

Q. After reading that letter wasn't there an additional expenditure of \$1,000 as a commission in connection with the purchase of this automobile?

A. The letter does not state it was \$1,000 commission, no, it does not.

Q. Well, let me ask you as an accountant what this sentence means, Mr. Moser: "The actual cost for our car, however, in Chicago was \$5,420, which does not include a little over \$1,000 of commissions and extras paid for this car."

A. Commissions and extras, not commissions.

Q. Oh, that is the quibble, on the word "extras."

A. You asked me a direct question and I answered it.

Mr. Parker: I move the statement of counsel be stricken and the Jury instructed to disregard it.

The Court: The Jury will disregard the remarks of counsel.

Mr. Parker: May I interrupt, Mr. Royston. At this point I think a matter should be cleared up which is a matter of record here. This stipulation number 26 contained in the [478] Government's own Exhibit 31 reads as follows: That on or about February 25, 1947, Louis P. Lutfy purchased one share of stock in the Arizona Country Club, Phoenix, Arizona, for the sum of \$500. And that on December 31, 1947, and December 31, 1948, he

(Testimony of R. Dale Moser.)

owned that share of stock. That is the Government's stipulation.

Mr. Royston: Yes, sir, that is right. What I was trying to show is the total expenditures which Mr. Moser has listed on this and if there was an expenditure of an additional \$100 as the check itself showed, which the witness stated, I think I should have a right to bring out that additional expenditure.

The Court: Mr. Royston, aren't you doing this, you agreed with counsel, both of you agreed and told the Jury they may accept it as a fact that he spent the sum of \$500 for this share of stock. Now you propose to go back on the stipulation because you find it advantageous for another purpose to show that isn't the fact.

Mr. Royston: No, sir, I am not disputing the fact the \$500 was the cost of the bond, what was paid for it, but under this statement, this accounting procedure which the witness has drawn up, there purports to list the expenditures of Dr. Lutfy. And if he expended the amount of \$100 in addition to this \$500 share of stock then it should show up under this expenditure. [479]

The Court: No. If you intended to show that you should not have stipulated to the fact it was \$500.

Mr. Royston: Well then, let me put it this way. We stipulated the cost of that particular bond was \$500. Now, here the witness has listed all the expenditures. Now, in connection with the purchase of that \$500 bond there was an additional expendi-

(Testimony of R. Dale Moser.)

ture of \$100 which does not show on this statement which was prepared by the witness.

The Court: No. I will sustain the objection of going beyond the stipulation.

Mr. Royston: For the purposes of showing the expenditures as connected with this statement?

The Court: On that particular item. Counsel stipulated as to the fact and that will be the fact in the trial.

Q. (By Mr. Royston): Now, Mr. Moser, go on down to this item which you subtracted, this \$2,506.27. Now, I will ask you to explain what this item was subtracted from?

A. It was subtracted from the item that was followed by the numeral 2, \$18,663.29.

Q. I will ask you if according to Dr. Lutfy's tax returns this amount as well as being included in the 18,663.29, if it was not also included under the capital assets?

A. That I would say as an item they were not. What doctor used in his computation I have no way of knowing. They were not listed as items, they were listed as expenditures and for [480] the purposes of this statement they must be reduced from that amount which was spent. He cannot be charged with spending the same amount twice.

Q. Well, if you say he can't be charged with expending the same amount twice just where is it in here twice?

A. If I didn't show a credit of 2,506.27 in this

(Testimony of R. Dale Moser.)

computation and showed he had spent the money as alleged by the Government for capital assets I would be charging him twice with an expenditure, is that not right?

Q. That is just the point I am trying to get at. As well as being included in this 18,663 on the return it was also included on the capital assets on the return, is that correct?

A. Again I will state it is not included as these assets on the return, that is correct.

Q. You state it was charged twice?

A. I didn't state it was charged twice, Mr. Roylston.

Q. I believe you said you subtracted it because it shouldn't be charged twice?

A. That is correct. You cannot charge the taxpayer on this statement with expending the same money twice for the same thing.

Q. Where are the two places it is charged?

A. It is charged in this 18,663.29.

Q. Where is the other one?

A. And you have claimed on your Government's alleged net [481] worth that it should be included in these items above. So in order to tie in with your net worth statement I have to show that amount expended to come to the total that you have in your statement at the end of the year. If I used that amount in that portion of the statement I am not going to charge the doctor again with it down here.

(Testimony of R. Dale Moser.)

Q. In other words, you computed it in the manner in which it should have been computed?

A. I computed it in a manner to tie in with your statement.

Q. But you did not compute it in the manner Dr. Lutfy listed it on his return?

A. The way Dr. Lutfy listed it on his return has nothing to do with that computation here, nothing whatsoever.

Q. That is all. Now, move on down. The same thing applies to item \$1,073.73?

A. That is correct.

Q. Now, concerning a payment made to Coles Furniture Store of \$283.05?

A. Yes, sir.

Q. You were here when the witness testified that amount was refunded to Dr. Lutfy?

A. Yes, sir.

Q. You show that as available income, you show the refund as available income for 1948? [482]

A. That is correct.

Q. Where do you show the expenditure of that amount to Coles?

A. In 1947.

Q. Where is it?

A. It is included in the total amount spent. The expenditure was not made in 1947, I mean in 1948, and the refund was. You have to take the amount that came in 1948, but there was no money expended in 1948 for that purchase.

Q. Yes, sir. If the refund is listed as available income in '48 then the expenditure for that amount has to show up somewhere?

(Testimony of R. Dale Moser.)

A. Yes, it was paid in 1947.

Q. Where is it in 1947?

A. It is included, the particular check was included in this figure of 18,663.29. In fact, the 19,023.79 reduced by the \$360.50.

The Court: At this time, Members of the Jury, we will take the regular morning recess.

(Recess.)

Q. (By Mr. Royston): Now, Mr. Moser, I believe you were testifying concerning an expenditure and refund from Coles Furniture Company in the sum of \$283.05, the expenditure being made in 1947 and refunded in 1948? [483]

A. That is correct.

Q. You stated that that expenditure was listed on the 1947 return in the figure \$18,663.29?

A. Yes, sir.

Q. I believe that item \$18,663.29 is a business deduction, is that correct?

A. That is correct. That was the amount which was spent, which was claimed for business deduction.

Q. Claimed for business deduction?

A. That is correct.

Q. Did you hear the lady from that furniture store testify that item was for a Marietta dining room set? A. I did.

Q. Is that an ordinary business expenditure?

A. May I make a statement?

Q. No, I want to get the question.

A. It is not.

(Testimony of R. Dale Moser.)

Mr. Parker: You may explain your answer if you wish. I believe that will be proper.

The Court: I will let you reach that on redirect examination.

Q. (By Mr. Royston): Now, Mr. Moser, turning the page over to the year December, 1947, and December, 1948. Under Expenditures as Alleged and Claimed Plus Cash End of Year, that item which was subtracted down there, \$2,912.20, the discussion [484] which we have had on the two previous years would apply likewise to this year?

A. That is correct.

Q. And the same thing would apply to the subtracting of the figure of \$855.48?

A. That is correct.

Q. That is the same as the discussion we had concerning the two previous years?

A. That is correct.

Q. Let's leave this thing for a few minutes. I think I have covered everything I wanted to on that.

You stated you have been a Certified Public Accountant for some number of years, Mr. Moser?

A. Yes, sir.

Q. And you received your training at La Salle Institute? A. Partially.

Q. That La Salle Institute, that is a correspondence course? A. That is correct.

Q. And you were certified both in California and now in Arizona? A. That is correct.

Q. I believe you stated you have been working

(Testimony of R. Dale Moser.)

on this particular matter of Dr. Lutfy's returns for the years 1945 up through 1948, you have been working on that for at least, off and on, for some year or so? [485] A. That is correct.

Mr. Royston: Would you mark this, please?

(Government's Exhibit 38 marked for identification.)

Q. (By Mr. Royston): Now, Mr. Moser, I hand you this 38 for identification and ask you if you have ever seen that document before and if so where and when? First, let me ask you, let me divide the question up. Have you ever seen that document before? A. I believe I have.

Q. Did you prepare that document?

A. Yes, sir.

Q. Was it prepared in connection with Dr. Lutfy's income? A. That is correct.

Q. Or in the income tax.

Mr. Royston: I will offer Government's Exhibit 38 into evidence.

Mr. Parker: May I ask a question or two on voir dire?

Q. (By Mr. Parker): Mr. Moser, when was this Exhibit 38 prepared?

A. That was prepared in the early part of January, I believe, in 1952.

Q. And for what purposes?

A. It was a computation which was prepared after a conference with Mr. Cass in Los Angeles either the first part of January or last part of

(Testimony of R. Dale Moser.)

December, in which certain information [486] which became available to us for the first time was given to me by Mr. Cass; and using that information without verification I attempted to show that Dr. Lutfy could have, from the income he reported, could have accumulated what the Government at that time were claiming he had.

Q. Did you at that time have the figures which have been made available here in this trial through the Government's Exhibit 33? A. I did not.

Q. And the stipulations? A. I did not.

Q. Were there any stipulations in existence at that time? A. No, there was not.

Q. You say these were unverified figures?

A. Unverified figures, mostly furnished in this conference I had with Mr. Cass.

Mr. Parker: If your Honor please, in view of the stipulations the Government has entered into in this trial I don't believe the Government should be permitted at this time to submit anything or to go into evidence which is contrary to those stipulations.

Mr. Royston: Let me ask just a couple more questions then reoffer the Exhibit.

The Court: Very well.

Q. (By Mr. Royston): Mr. Moser, before you prepared [487] this which you carried over to Mr. Cass I believe you examined all of the deposit slips for the years 1945 through 1947, isn't that correct?

A. No, just a portion of 1947. All of 1945.

(Testimony of R. Dale Moser.)

Q. Well now, just to refresh your recollection on that matter, without having it marked, I will show you that and ask you if that refreshes your recollection, that first paragraph?

(Document handed to the witness.)

Q. Did you read it? A. Yes.

Q. Does that refresh your recollection as to whether you examined——

A. I examined the records, yes.

Q. And all of the deposit slips for the years 1945 through 1947?

A. Through October, 1947, I believe.

Q. And you identified the source of substantially all the funds deposited according to those deposit receipts? A. That is correct.

Mr. Royston: I will reoffer this.

The Court: May I see it. I will reserve ruling on that until I have had a chance to study it.

Mr. Parker: May I state an objection, that it is immaterial, irrelevant and the further objection the Government [488] is now attempting to impeach its own stipulations.

Mr. Royston: It might save the Court some time if I made the representation there is only one figure on that which I want to refer to.

The Court: You go ahead. I will give you an opportunity to do that before I rule on it.

Mr. Royston: All right, sir.

Q. (By Mr. Royston): Now, to discuss just

(Testimony of R. Dale Moser.)

a few minutes these log books which were kept by Dr. Lutfy? A. Yes, sir.

Q. Which you testified yesterday concerning the log books and methods of entry? A. Yes, sir.

Q. You mentioned there were certain imperfections in this so-called physicians' log book as far as bookkeeping procedure?

A. That is correct.

Q. Isn't it true such a record as this log book or any similar record will correctly reflect the income only to the extent the correct information is recorded in that record?

A. That is true of any set of books.

Q. It reflects it only to the extent it is correctly recorded? A. That is true.

Q. That is a true statement of any record applying to receipts as well as expenses, isn't that true? [489] A. That is correct.

Q. You mentioned the so-called regular books. Will you explain what you mean by "regular books"?

A. By that I meant a double entry set of books where an error could be detected because your subsidiary ledger and other substantiating books would not be in balance with the amounts you showed on your control accounts.

Q. Isn't it true this method of bookkeeping you refer to as regular books they will fail to reflect true income if income is not recorded in the books?

A. Yes. If the information is recorded only in part—for instances, in reconciling your bank ac-

(Testimony of R. Dale Moser.)

count and that amount of money went into the bank and wasn't reflected in the income in that book that would be detected.

Q. Isn't it true regardless of the type of records kept by any business or professional man that the correct information must be entered in those books in order to reflect the correct income, isn't that true?

A. I believe that is self-evident, yes.

Q. As to any books? A. Any.

Q. Whether this log book or regular books, anything else? A. That is right.

Q. Well now, you heard Mrs. Way testify?

A. Yes. [490]

Q. And you heard her state that each night before she and the doctor left the office that these books were checked and rechecked to make sure there were no errors in the books?

A. That is correct.

Q. Now, you examined these duplicate bank deposit tickets? A. I did.

Q. All bank deposit tickets of Dr. Lutfy?

A. All available to me, yes.

Q. You stated from your examination you eliminated from these deposits any items which did not relate to the defendant's medical practice and that you discovered that the receipts as reflected by the log book exceeded those deposited in the bank account, wasn't that your testimony?

A. That is correct.

Q. Now, are you attempting to say Dr. Lutfy

(Testimony of R. Dale Moser.)

reported more income than what he actually earned?

A. No. My only purpose in making that statement was to show that our examination of the duplicate deposit slips did not reveal he had received money from that source which was not reported.

Q. Did you ever check the bank deposits to see if there were any receipts or if any receipts were deposited through these bank deposits that were not reflected in this log book? A. Yes, I did.

Q. Did you find any receipts on the deposit slips, any [491] money that had been received and listed on the deposit slips that did not reflect in the log book? A. Yes, I did.

Q. Now, on finding that then would you state the books were kept completely or incompletely or how?

A. I would say that there were errors in the bookkeeping.

Q. Would you state the books reflected the true income of Dr. Lutfy?

A. No, they did not reflect the true income.

Q. Were the figures in the log book used in determining—— A. They were

Q. What other check of Dr. Lutfy's records did you do, briefly?

A. Examining cancelled checks. I examined the patients' cards, log books and deposit slips.

Q. Did you find——

A. And supporting evidence of various kinds, letters and so forth of correspondence.

Q. You examined his returns, too?

(Testimony of R. Dale Moser.)

A. I examined the returns.

Q. Did you find where Dr. Lutfy had changed any personal expenses to business?

A. I found items which were debatable, which in my opinion possibly without investigation as to what an item might be, might be assumed to be personal, but that in the net worth [492] case again it is immaterial what the deductions are as long as we account for the expenditures. That is what this statement I just had brings forth.

Q. Did you find this Marietta dining room table? A. I found an expenditure there.

Q. Did you find it listed under business expenditures?

A. I did. Could I elaborate on that a little bit?

Q. I am sure you will be given an opportunity, you might as well do it now. Go ahead.

A. I found there were several checks as stipulated introduced into evidence by the Government which was agreed upon as to amounts spent as to this particular place. I found that was the only check during the three years which was changed to personal expenditures.

Q. You mean which was changed to business?

A. To business instead of personal, on that particular concern.

Q. You heard the testimony concerning this other purchase of a French Provincial table; you heard Mr. Whitsett's testimony it was changed to drugs and supplies? A. Yes.

Q. Did you find that in the records?

(Testimony of R. Dale Moser.)

A. I found that in the records, yes.

Q. That was another item in addition to this Marietta dining room set? [493]

A. It did not come from the same place.

Q. No, but I understood you to say the only check you found so changed——

A. I made the statement, I believe, Mr. Royston, that I examined other checks made to the same concern to which this check was and none of these other checks other than this one check was changed to business expenses.

Q. You mean as far as any expenditures to Coles Furniture that was the only one there is to business expenditure?

A. That is correct, that is the only one I found changed to——

Q. To this Dorris Heyman Company you found this French Provincial table changed to drugs and supplies?

A. That is correct. I found a check changed to supplies. I didn't find it was a Provincial table at that time.

Q. At that time? A. That is correct.

Q. Did Dr. Lufly tell you what that was?

A. What the purpose was. I discussed the matter with Dr. Lufly and he told me that to the best of his knowledge that at that time he took the date into consideration and all; to the best of his knowledge it was for a diathermy couch.

Q. Diathermy couch?

(Testimony of R. Dale Moser.)

A. He said he believed that was what it was, he believed [494] it was for a diathermy couch.

Q. You found these two poker losses of approximately \$700? A. I did.

Q. And you found those were changed to——

A. I did.

Q. Now, did you find these compotes which Mrs. Lutfy purchased?

A. I found a check for \$36 and some cents, I believe.

Q. Were you told those were for compotes?

A. No, I wasn't.

Q. You heard Mrs. Lutfy testify concerning the purchase of the compotes? A. I did.

Q. You found those were changed to drugs and supplies?

A. I found they were changed to expense. I could go to my record and see what account they were changed to.

Q. Anyhow, it was changed?

A. Yes, I believe it was changed.

Q. If it wouldn't take too long see if it was changed to drugs and supplies?

A. That was in what year, Mr. Royston?

Q. I believe it was 1946. It is a purchase from Rosenzweig Jewelers.

A. Do you have the date of the check? [495]

Q. Well, not close here. I have got it but I don't know where to look for it.

A. December 31, 1946. Yes, it was changed to drugs and supplies, \$36.72.

(Testimony of R. Dale Moser.)

Q. That was the purchase Mrs. Lutfy testified was made for Christmas gifts?

A. That is correct.

Q. It was on December 31, 1946?

A. That is correct.

Q. And changed to drugs and supplies?

A. That is correct.

Q. In checking through Dr. Lutfy's records did you find any items which were capitalized and also changed to expense?

A. The doctor's records do not capitalize items.

Q. Did you make an examination of the records to tell just what had been going on?

A. I examined his checks as I explained and his log books, but his records don't show what have been capitalized.

Q. Well now, referring to Government's Exhibit 27 and referring to the part of the Exhibit which Mrs. Lutfy stated is in the doctor's handwriting from depreciation down to this word "improvement and addition," did you ever see that particular record? A. Yes, I saw that record.

Q. And what is that? [496]

A. That is a list of equipment—not a list of equipment but a classification of equipment by total amounts.

Q. Well, is that a capitalization schedule?

A. No, it isn't a capitalization schedule, it is a depreciation schedule, you might call it. It is a list. Actually it isn't a schedule. Actually what it is it is a list of, in round figures, of medical

(Testimony of R. Dale Moser.)

equipment, X-ray equipment, clinical, and so forth, with no depreciation figured on it. It isn't an itemized list of what makes up the capital assets at all.

Q. The what?

A. It isn't an itemized list of what makes up the capital assets.

Q. What I am trying to get at—I don't know the exact phraseology for the account but isn't that a depreciation schedule of capital assets?

A. No, it isn't a depreciation schedule. There is no depreciation on it at all.

Q. Does that schedule refer to capital assets?

A. That refers to assets subject to depreciation.

Q. Are assets subject to depreciation, capital assets?

A. By definition they are not, by income tax law.

Q. What is a capital asset, Mr. Moser? I think we are haggling over details.

A. I am trying to answer the question as you ask it. [497]

Q. Let me ask you this. Would medical equipment, X-ray equipment, laboratory equipment, office building, an addition to office, stucco house—I can't read the next one—and a triplex, are those classified as capital assets?

A. No, sir, they are not.

Q. What are they?

A. They are other assets which under Section 117-J under the Internal Revenue Code may be treated as capital assets.

Q. These are items which can be treated as

(Testimony of R. Dale Moser.)

capital asets? A. Yes, sir.

Q. In your expert opinion if I was asking you about the capital assets would I ask you further if you found any items which were capitalized and credited as business deductions both?

A. Again I must say there is no way of determining what is in the doctor's list of other assets. There is no itemized list at all available. I do not know what he included.

Q. Didn't you make an audit of the doctor's books?

A. Yes, sir. There was nothing to audit on this particular question.

Q. From the returns did you find that items were both listed for depreciation and listed for business expenses? A. I did not.

Q. Did you find that in the doctor's [498] records? A. I did not.

Q. Did all those figures in the doctor's records mean anything to you?

A. They could have been built up but there were no figures there, there was nothing to indicate what items were changed into this amount here, nothing at all.

Q. Let me ask it this way. From your examination of Dr. Lutfy's records could you tell that there were no items which were capitalized and also claimed as business deductions?

A. I could not tell they were not; I could not tell they were.

(Testimony of R. Dale Moser.)

Q. You couldn't tell much of anything from the doctor's books, is that what it amounts to?

A. On this particular question, that is correct.

Q. Let me ask you this. As an accountant, if a taxpayer capitalizes assets and claims then the same assets under business expenditures and if the taxpayer lists personal expenditures as business expenditures what effect does that have on the ultimate tax which the taxpayer has to pay on the income?

A. In those cases where if he had capitalized items and claimed it as depreciation and also claimed it as expense it would result in a double deduction.

Q. And would result in a smaller tax?

A. In a smaller tax.

Q. And would the same thing apply as far as expenditure [499] for personal items which are listed as business expenditures?

A. If they were non-allowable items it would be a deduction in a tax. It would not effect a net worth in any way or effect expenditures for the period.

Q. Let me ask you this. Personal expenditures are not deductible, is that correct?

A. That is correct, purely personal items. Certain personal items are not deductible.

Q. Well, would a Marietta dining room set be deductible? A. No, it would not be.

Q. Would a French Provincial table be deductible? A. No, it would not.

(Testimony of R. Dale Moser.)

Q. Now, referring to items such as that, if the taxpayer claims those expenditures as business expenditures what would the result be in the final tax which the taxpayer pays?

A. It would be less.

Q. Now, in examining Dr. Lutfy's records did you find any utility bills with relation to this Granada Street property, the residence of Dr. Lutfy, which were listed as business expenditures?

A. I found a very, very few.

Q. But there were expenditures there?

A. Very few, yes. Very few.

Q. Now, referring to this 1948 return, the items which are listed for depreciation purposes on that 1948 return, did [500] you attempt to determine from Dr. Lutfy's records what the actual cost of each of those assets was? A. I did not.

Q. You didn't go into that? A. I did not.

Q. Did you not need that figure for a full audit of Dr. Lutfy's records?

A. If I was going to make a certified audit as a doctor I would need it, but for income tax purposes I did not think it necessary because I started from another basis.

Q. This audit you made is not a certified audit?

A. I have expressed no opinion. This is not a certified audit, this is a tax audit pertaining to this case only. This is not a certified audit at all. A certified audit is entirely a different thing. A certified audit is an audit in which you state that without any qualified opinion or qualified opinion, as

(Testimony of R. Dale Moser.)

the case might be, that a certain business has a certain amount of assets and liabilities as of a given date, which are confirmed with outside creditors and so forth and so on. It is entirely a different proposition than obtaining information in regard to taxes.

Q. A certified audit of necessity has to be a much more thorough audit than the one you conducted on Dr. Lutfy's records?

A. I would not say it is necessarily much more thorough, [501] it is different.

Q. In order to certify this particular audit it would require much additional work?

A. It would require additional work; it would not require some of the work which I did, which would not have been required. In other words, to clarify that a little bit for you, possibly, take as a given date we will take the bank account; it would be sufficient to verify there was a certain amount of money in the bank as of a certain date but would not be necessary to verify where that money came from over a period of time. There is no comparison.

Q. Is this statement correct that your information would have to be more accurate to certify an audit than if it wasn't certified, the information on which you based the audit must be more accurate than a certified audit?

A. No, I think that is not a correct statement, Mr. Royston. I think the statement would be that it would require outside confirmation other than

(Testimony of R. Dale Moser.)

the records of the person which we are auditing more than the fact it would not necessarily be accurate.

Q. Just in general, if a businessman walks into your office and says, "I want your audit on this and I want to make sure that all these things are accurate in my books," would you advise the client to have a certified audit?

A. It depends on what purpose he wanted the statement for. [502]

Q. If he wanted a real good audit, just a perfectly good audit, would you advise it to be certified?

A. No, not necessarily. I will state it this way. If a man came in and he wants to know that every transaction in his business had been properly recorded, there was no chance of any error in any single item of one cent to one thousand dollars in any amount, I would make a detailed audit of that man's records of every transaction that had taken place entering into his books and I would still not be able to certify that statement.

Q. Let me ask you this question. I don't mean to be dwelling too long on this, but is a certified audit of necessity more accurate than a general audit?

A. Not more accurate, I wouldn't necessarily say.

Q. Let me ask you this. What is the purpose of a certified audit?

A. The purpose of a certified audit, the principal purpose is to have an independent opinion given by personnel who are trained to present the facts stat-

(Testimony of R. Dale Moser.)

ing the net worth of a particular business, results of its operations for a certain period of time. And in order to acquire that statement you have to send out notifications to every account receivable; you have to confirm directly with the banks as to the amount on hand on that particular date. You don't have to go back and find out how that money got there; you have to [503] send notifications to every person who that client has purchased anything from for the entire period to find if they owed them anything in that time which was not on the records, you have to investigate any contingent liabilities the client might be trying to secure or a note at the bank, commitments he might have as far as purchasing material.

Q. So we won't go on all morning, let me ask you one further question, maybe we will get it cleared up. When you certify an audit, that means the same as if you are insuring the correctness of that audit, isn't that correct? A. No, it does not, sir.

Q. What does it mean?

A. In means, in my opinion——

The Court: Mr. Roylston, the certificate would determine what it meant. You can't talk about the certificate without knowing what the certificate is.

The Witness: We don't even state——

The Court: Just a moment. I am trying to save a little time here.

Q. (By Mr. Roylston): This wasn't a certified audit here? A. This was not a certified audit.

Q. I will leave that point. This audit you made

(Testimony of R. Dale Moser.)

you state was in connection with only income tax purposes? A. That is correct.

Q. In connection with the income tax purposes, did you make [504] any attempt to determine if Dr. Lutfy depreciated the furnishings in his personal residence? A. I did not know.

Q. Well, if a taxpayer depreciates furnishings in his personal records would that affect the final tax which is to be paid? A. That is correct.

Q. Is a taxpayer allowed to depreciate furnishings of his personal residence? A. He is not.

Q. Did you attempt to determine if Dr. Lutfy depreciated the building of his personal residence, the place where he lived?

A. No, I did not. As I stated, Mr. Royston, I attacked the depreciation problem from an entirely different angle. In fact, we put in evidence yesterday.

Q. Just from a general principal a taxpayer is not allowed depreciation on his personal residence, building or the furnishings, is that correct?

A. That is correct. [505]

* * *

Cross-Examination

(Continued)

By Mr. Royston:

Mr. Royston: If it please the Court, at this time we offer Government's Exhibit 38 for identification. I will show it to Mr. Parker.

Mr. Parker: If your Honor please, I see nothing

(Testimony of R. Dale Moser.)

to [507] change the situation with respect to this Exhibit, therefore I make the same objections heretofore made and the further objection as appears here, the Exhibit in the course of negotiations looking toward compromise and so forth——

The Court: The objection will be sustained.

Q. (By Mr. Royston): Mr. Moser, in connection with your testimony yesterday afternoon concerning that statement which was made out by Dr. Lutfy, to, I think the Northwestern Mutual was the name of it? A. Yes, sir.

Q. Do you have your figures on that with you?

A. I believe I do have, sir.

Q. Can you tell me, please, sir, what those figures are and let me set them down here so we can get them big and look at them; tell me what you did in computing that figure which you stated to Mr. Parker showed Dr. Lutfy, during that period, had more income than what the statement showed?

A. The business income per month, \$1,665.

Q. That's what the statement showed which was made by Dr. Lutfy to Northwest Mutual?

A. That is correct.

Q. Show me the next, what you did?

A. Took per year which would be twelve times that amount, I believe would be \$19,980.

Q. \$19,980? [508]

A. I believe that is correct.

Q. All right, sir. What did you do next?

A. Then I took the amount of reported gross income for information only for professional services.

(Testimony of R. Dale Moser.)

Q. What figure was that?

A. \$37,105.29. Then I took the net income reported from his return.

Q. Yes, sir. A. I believe \$16,927.37.

Q. Yes, sir.

A. To that figure is net, I added back the non-cash deduction, \$3,600.

Q. You added that to the \$16,000?

A. That is right.

Q. Is that the figure you got?

A. I believe so.

Q. Then what did you do next?

A. That is it.

Q. Actually, this figure, here, doesn't have anything to do with it? A. Nothing at all.

Q. I will rub this one off. You state, according to the statement which was made to the insurance company, this was the amount of net through annual income?

A. That is the way I computed it, yes, sir. [509]

Q. And, according to your computation and the returns, you added back the \$3,600 which was an expenditure? A. Which was not an expenditure.

Q. Which was not an expenditure?

A. That is correct.

Q. That leaves this amount here (indicating).

A. That is correct.

Q. Which, according to the doctor's income tax statement, he actually had as net income during that year? A. From the professional income, yes.

Q. Now, I am going to set that off, Mr. Moser,

(Testimony of R. Dale Moser.)

and I am going to ask you now, to give me the figure—this is the figure that was reported on the line as net income from professional?

A. That is correct.

Q. What is the amount shown on the statement which was signed by Dr. Lutfy to the insurance company as a monthly income from rentals or whatever that next figure stated there?

A. I don't have the Exhibit, but I believe from my working papers here, it was \$660 per month.

Q. \$660. Now, if these two figures which the Doctor stated on that statement to the insurance company are added will give \$2,325 per month, is that correct?

A. That is correct.

Q. Now, we take that for a year which is the same as you [510] did over here (indicating), does that look like it would be correct?

A. Looks like it would be approximately so.

Q. Now, then, I am getting up to a question, now. All this is leading up to what I want to ask you. Now, I want you to watch this next computation and tell me what is wrong with this computation which I am setting here on the board. I am going to take this amount of net reported income off the Doctor's return—do you have a return for that year there?

A. I have a copy of it.

Q. I am going to set that down, \$19,453.62. Is that what your copy shows?

A. That is correct.

Q. What was the amount it shows on yours as the total amount of expenditures on that '48 return?

(Testimony of R. Dale Moser.)

A. Total amount of expenditures?

Q. Yes, sir. Is it \$4,442.88, is that what your return shows? A. No, nothing like that.

Q. Maybe I am asking about the wrong figure. Now, this figure of \$3,600, that was the amount claimed as depreciation on the medical practice?

A. That is correct.

Q. All right, sir. Look at the '48 return, and tell me what the amount is claimed from both the medical profession and [511] the rentals, the amount of depreciation there?

A. I believe the figure for depreciation on the rental was claimed at \$842.88.

Q. Adding that to this \$3,600, this is the amount claimed on the business? A. That is correct.

Q. The profession? A. That is correct.

Q. And the other amount on the rental, that adds to a total of \$4,442.88, is that correct?

A. That is correct.

Q. Now, then, adding that together, the total amount which is the same as you did here on the medical part, this was on the medical profession alone? A. That is right.

Q. On the entire amount, adding that together, I got \$23,896.50, is that correct?

A. That is correct.

Q. Now, explain to me then, according to the statements which Dr. Lutfy made on that insurance statement, why wouldn't that statement made on the insurance statement show that Dr. Lutfy's stated net

(Testimony of R. Dale Moser.)

income was approximately \$4,000 more than the reported income?

A. I can explain that if you will let me.

Q. That is what I am getting up to. [512]

A. I asked that question of Dr. Lutfy; he told me that he gave this information to the insurance agent in his office. He asked him what he thought he made from his professional income and he said an annual figure which is approximately sixteen thousand—sixteen hundred, sixty-five dollars. He asked him what his figure was for rent; Dr. Lutfy figured up rapidly in his head the amount he got each month from his rental income and he said approximately \$660.

Q. Now, Mr. Moser, what I am trying to get at, this computation you did yesterday tended to show, at least it seemed to me like it showed that the Doctor actually had this amount of income and that, according to that statement to Northwest Mutual, he stated he only had this amount (indicating)?

A. That is correct.

Q. Which would show a surplus of five or six hundred dollars?

A. That is correct.

Q. Now, why would you use this computation yesterday and show that Dr. Lutfy actually had more income than he stated on there if this is correct and this one shows he exceeded the reported income by approximately \$4,000?

A. If you would have let me continue I think I would have brought that point out.

(Testimony of R. Dale Moser.)

Q. Excuse me. I thought you were talking about some conversation. [513]

A. That is right. That is what I asked the doctor.

Q. Go ahead.

A. He said \$660 per month was computed in his head as the amount of rental income he received, and is actually reported on the return which would be the total, incidentally, for the twelve months, \$7,980. He reported his actual receipts from rent as \$7,735, the difference between the figure you have computed there, and the \$27,900 which you have above, is the expenses of his rental property. And when he gave the figure to the Northwestern Mutual, he figured the amount of income he had by months from these individual properties.

Q. Just a couple more question, Mr. Moser. What I am trying to get at is that according to that statement which Dr. Lutfy signed and turned over to Northwest Mutual, isn't it true that, according to that statement Dr. Lutfy stated, he had this amount of net income, \$27,900? A. That is true.

Q. And when you take Dr. Lutfy's return and show the reported income isn't this amount of the reported income which Dr. Lutfy showed on his return, \$23,896.50? A. That is correct.

Q. So actually, yesterday, when you stated that the doctor's monthly income exceeded that which was made on the statement, you didn't include all of Dr. Lutfy's income?

A. I didn't make the statement the doctor's in-

(Testimony of R. Dale Moser.)

come—I [514] made the statement his professional income exceeded that. That is the only statement I made, I believe.

Q. You stated his professional income as reflected by that statement filed with the insurance company, that his reported income was greater than his actual income? A. That is correct.

Q. But now, in order to get the full benefit of that statement and these computations here, it shows actually the statement which Dr. Lutfy made about his income at that time was approximately \$4,000 more than what Dr. Lutfy showed on his return?

A. That is correct.

Mr. Royston: That is all.

Redirect Examination

By Mr. Parker:

Q. As I understand you, Mr. Moser, the figure of \$660 of the rental income is a gross figure and not a net figure as indicated on the insurance company Exhibit? A. That is correct.

Q. And the difference that Mr. Royston is making so much of here is the difference that would be accounted for by the expense of the rental properties, maintenance, repairs, taxes, and so forth?

A. That is correct.

Q. And the net result of that is, there is no substantial discrepancy at all? [515]

Miss Reimann: I object to the leading questions, your Honor.

(Testimony of R. Dale Moser.)

Mr. Parker: It is leading.

Q. (By Mr. Parker): Is there any substantial discrepancy taking into consideration the expenses of the rental property?

A. The statement, Mr. Parker, has inserted as I recall from reading the Exhibit—I don't have it before me—it has in parentheses after the figure, it has "net," which would indicate, of course, net; as the doctor told me he gave them the amount of monthly income he had.

Q. Then the figure of \$660 per month rental income is the approximate gross, not the net?

A. That is correct.

Q. And as you say, computing the rental at \$660 per month gross would give you \$7,900 and some-odd dollars?

A. That is correct.

Q. Whereas, in fact, after the close of the year he reported \$7,700 and some-odd dollars?

A. Yes.

Q. If you recall or refer to the Exhibit, the Exhibit to the insurance company was signed, I believe, in May, before—well, with only four and a fraction months of that year gone by at the time he signed that particular Exhibit?

A. That is correct.

Q. Now, Mr. Moser, Mr. Royston asked you about [516] imperfections in the log book and so forth. I will ask you, Mr. Moser, if your work as an auditor and accountant you commonly or often find anybody's set of books which are entirely perfect and without error or mistake or irregularity of any sort?

(Testimony of R. Dale Moser.)

A. I think I have my first one to find.

Q. And would it be a true statement to say that in the most carefully kept set of books that might be found in any business or profession it would be expected that some errors would be found?

A. I believe that would be true.

Q. Now, directing your attention, say, for illustrative purposes to the year 1948, I believe you have heretofore testified that you had enumerated the cash transactions during that year as recorded in the log book and found there were 3,891 such transactions. Will you tell me how many errors or omissions or mistakes you found for that year?

A. For that year on the information recorded on the patients' cards as being credited to the doctor and were not recorded in the log book, I found that there were fourteen instances.

Q. Fourteen instances out of that number of transactions. Now, if I may see Exhibit 36, please.

With respect to this Exhibit 36 which has received so much attention in which some losses of cards were charged to [517] entertainment, do you observe on the second sheet thereof the letters "O.K."?

A. Yes, I do.

Q. Are those in Dr. Lutfy's handwriting in your opinion? A. I would say not.

Q. In the course of your investigation of this matter, in your audit, did you discover whether or not the accountant who was then employed by him okayed that as a proper charge to entertainment?

Mr. Royston: I object to that as hearsay, if

(Testimony of R. Dale Moser.)

some other accountant is supposed to have written that.

The Court: The objection will be sustained.

Q. (By Mr. Parker): Now, Mr. Moser, I am a little bit confused, to put it mildly, in one respect. Am I correct in my recollection that you testified that the total income reported by Dr. Lutfy for each of these years was more than the total of the bank deposits for each of these years?

A. No, I don't believe that was exactly correct, Mr. Parker.

Q. Will you straighten me out. Maybe somebody else labors from the same brand of confusion.

A. I stated the starting point to try and determine whether all of his professional income had been reported through the tracing of receipts in which we identified all of the sources of income which we could, which went into his bank [518] deposits, coming from sources other than income from professional business, then the amounts which we could identify by the log book from the deposit slips by name, we identified those as coming from professional business. There was certain amounts of cash deposited and there was certain amounts which we were unable to identify as coming from any source. My statement was the amount of gross income that he reported from his professional fees exceeded the amount which we were able to determine from his professional income, plus the cash which was deposited——

(Testimony of R. Dale Moser.)

Q. Now, are you referring to cash that could be identified as well as unidentified?

A. You could never identify the cash. It would all be unidentified cash. Plus the sum of all the unidentified items we were not able to identify, coming from some place else. All of those together were less than the amount which he reported as being from professional income.

Q. Now, with respect to the category of drugs and supplies, will you state to the Jury the general nature of matters charged to that particular category?

A. The drugs and supplies, practically all purchases were charged. There were some segregation. There was an item of stationery, definitely stationery, was charged to stationery. But practically all purchases were charged to the designation "drugs and supplies." [519]

Q. Whether they were in the nature of drugs or not——

A. Supplies of any kind, whether they went to janitor supplies, they were charged in that one category.

Q. Mr. Moser, I think by way of concluding this examination I don't believe it would be too repetitious to ask you once again, if I have not made it clear, to state the purpose of the net worth approach to this type of problem.

A. Well, the net worth approach would be to take as a starting point a given established, claimed, alleged or whatever point you arrive at, a given

(Testimony of R. Dale Moser.)

figure to start a period. That is a net worth figure, worth of the client at the time, or taxpayer. Then you add to that all of the income which he had, whether it is taxable or non-taxable, and apply that to the purchase of assets which would be included in the net worth statement at the end of the year; and you also include all of the expenditures which he has for professional business expense, personal expense and everything else, all the expenditures which he made. If it is shown from the funds which were available that he could have made all the expenditures and have all he was supposed to have at the end of the year, then you have proven that his net worth is possible to be obtained from the income as reported on his return.

Q. Then the objective of the procedure is to discover unreported income if there is any?

A. That is correct. [520]

Q. If I understand your conclusions, the net worth approach here does not disclose any unreported income?

A. That is correct.

Q. As I understand it, for the purpose of this net worth method, you take, you lump all expenditures of personal, business or whatever nature?

A. That is correct.

Q. And you are not concerned in the application of the net worth method with whether such expenditures be deductible or non-deductible for tax purposes?

A. That is in proving the net worth, yes, that is correct.

(Testimony of R. Dale Moser.)

Q. This additional funds available carry-over that is on your Exhibit G for each of these years represents the margin of leeway which the defendant had on a net worth basis, reporting the amount of income he did report? A. That is correct.

Mr. Parker: That is all.

Recross-Examination

By Mr. Royston:

Q. Mr. Moser, I want to ask you one more question. The way you are explaining this now you stated when the doctor looks at this item 660, he listed it as net and he meant gross?

A. That is correct.

Q. When he listed this item he listed it as net and meant net? [521] A. That is Correct.

Q. That is the explanation now?

A. That is what the doctor told me, yes.

Q. He told you that within the past year or so?

A. He told me since this was presented in Court was the first time we knew about this appraisal.

Q. He told you within the last day or so?

A. That is correct.

Q. You stated when you checked these patients' cards against the log book you found only fourteen errors or contradictions?

A. Fourteen credits to the patients' cards which were not reported in the log book.

Q. Isn't it true the patients' cards carried only charge items and no cash items?

(Testimony of R. Dale Moser.)

A. Oh, yes, that is correct.

Q. Did you check the deposit slips to find out how many entries were made on the deposit slips which did not show on the log book?

A. There were many entries on deposit slips which could not be identified as coming from patients. It was an almost impossible task—I think your witness testified to the same.

Q. Did Dr. Lutfy indicate other than patients and tenants that he would have been receiving money from any persons other than you have testified here concerning these one or two loans? [522]

A. Yes, he did indicate that.

Q. Did he do a great amount of business with other than his own medical patients and the tenants?

A. No, he did not.

Q. Did you ask him about these items which were listed on the deposit slips, did you ask him if they were patients when you could find no corresponding entry in the log book?

A. That is correct. I asked him; sometimes he could not identify what they were, did not remember the transaction; sometimes he could identify the fact it was a certain company, we will say, in which it was an odd amount check, say, \$42.58 or some such figure and which he knew one of his patients had worked for that man and he assumed that would be a pay check.

Q. He had money coming from so many different places he couldn't begin to keep up with it, is that right?

A. No, I wouldn't say that, sir.

(Testimony of R. Dale Moser.)

Q. While you were checking through these records, did you find any evidences of any items purchased by Dr. Lutfy's family for their own use, such as drugs, supplies, items from the drug store?

A. I did not find anything of that kind.

Q. Were you able to determine whether Dr. Lutfy and his family had charge accounts at any of the drug stores?

A. No, I didn't ascertain that.

Q. Did you find whether or not the family had any [523] expenditures such as magazine subscriptions, anything like that?

A. I did not.

Q. Did you find any evidence of payments of dry cleaning or laundry for the family, anything like that?

A. I found evidence of that, yes.

Q. Of dry cleaning?

A. Yes, to the Phoenix Laundry, we will say laundry and dry cleaning.

Q. How was it charged on the doctor's records, was it charged to his personal expenditures?

A. There is no charge on the doctor's records to a personal—I don't think you will find those listed in many cases, if any, as a charge to any deduction whatsoever.

Q. Well, these items which you did find, such as dry cleaning?

A. Dry cleaning.

Q. Did you say you couldn't find them anywhere in Dr. Lutfy's records, all you found was a check?

A. Yes, a check. They were not charged to—I think I can show you that they were not charged.

Mr. Parker: What do you mean, "not charged"?

(Testimony of R. Dale Moser.)

The Witness: They were not claimed as a deduction on his professional expense.

Mr. Royston: I object to both of them testifying.

The Court: Mr. Royston, I think you are beyond the [524] scope of the redirect examination at any rate.

Mr. Royston: All right, sir. I will stop that line of questioning. That is all. [525]

* * *

Mr. Parker: Your Honor, I do not wish to consume time of the Court by any repetition of matters heretofore stated to the Court; however, at this time the defendant does move for judgment of acquittal by direction of the Court without submitting this matter to the Jury upon the state of the record which now exists. I might say this, that I had previously contended that this did not appear to us to be a proper net worth case. While it has been tried on a net worth theory and only because the Government saw fit to so try it, and our preparation has been made largely on a net worth basis, we feel that if the Court should agree with us that it is not a net worth case that the entire case would have to go.

The defendant has shown here beyond dispute to have kept a regular set of books. The Internal Revenue laws do not require a taxpayer keep any particular type of bookkeeping [535] system. That is up to him. It has been shown the type of books and rec-

ords he kept are commonly kept by persons of his calling and profession, and therefore there appears to be a very serious question about the employment of the net worth approach to the case.

We further move and again reiterate that the case is now stronger for dismissal or direction of acquittal than it was at the end of the Government's case, because we have shown that even on a net worth basis there is no undisclosed income or unreported income. And the gravamen of the indictment here, it seems to me, and especially when read in the light of the bill of particulars, is an allegation of unreported income. We have shown by proof which I consider to be altogether competent and persuasive and by computations which have, for the purpose of the computations, accepted and swallowed whole the Government's figures; we have shown that Dr. Lutfy's reported income is reconcilable with his expenditures and with the increase in his net worth for each of the three years involved.

Furthermore, we feel that this case is at this stage a stronger case for a direction of acquittal than it was at the end of the Government's case, for the reason that it now appears beyond peradventure that the Government has not marshalled all of the doctor's assets as of the starting date of the period here involved. It is entirely clear now that [536] the doctor had a substantial amount of life insurance. The proof shows the approximate sum of forty-five thousand in face value of such policies; that the policies or some of them have been in effect for quite a number of years and the Government has made no effort to deal with that problem, no effort in their

own case, no effort whatsoever during the presentation of the defendant's case. And as I apprehend the principal, when operating on a net worth basis the absence of one single asset or failure to prove that the assets which are enumerated by the Government cover the entire field is absolutely fatal. I should like to reiterate the position previously taken that there was no proof, no competent evidence of any kind as to the cash on hand. It is true that Mr. Whitsett, in rapidly answering the question, and I think unresponsively, and without an opportunity—it was no fault of his—nevertheless, the opportunity to make a proper objection at the time wasn't present, did say that at some conference Dr. Lutfy estimated or thought that might be about right or estimated that might be about right. We are certainly going to contend that the Calderon Case represents the law in this Circuit, notwithstanding that there is some division of authority there. At least we are comforted by the latest case and we believe that is not proper or competent evidence of cash on hand in that the Government was under an obligation to prove that element by independent testimony, independent of [537] any acquiescence or admission of the defendant.

On the whole case as a net worth case, which it seems to me it apparently is, I admit there are some other miscellaneous elements in it, remnants of one sort and another revolving principally around tables, as I recall, it is our contention that there is no sufficient evidence of that character to go to the Jury

and that as a net worth case the case should not go to the Jury.

I am again constrained to come back to the Government's bill of particulars and the amplifications and amendments thereof. It seems to me in considering this motion the Court should recognize the rule that whatever the extent of the record is here, the rule that is universally recognized is the bill of particulars and amendments thereto to operate to limit the proof; and that when the Government cuts the cloth to a particular width the Government must abide by its own pattern. We urge the Court to take that matter into consideration as well.

That in substance, adding only the general proposition that in our opinion there is not sufficient evidence here to submit this case to the Jury, even on the point of wilful attempt to evade or defeat a tax; I think the Government has wholly failed to show that by any substantial evidence. And that the case is in such a state that any verdict which might be rendered by the Jury adverse to the defendant would be on [538] shaky ground indeed.

For those reasons and all of them we respectfully move the Court that a direction for an acquittal be given and judgment be entered accordingly on each and every count of the indictment.

The Court: I will reserve ruling on the motion. [539]

* * *

COURT'S INSTRUCTIONS TO THE JURY

* * *

The Federal Income Tax System is primarily one of self-assessment by the taxpayer and in order to achieve the fundamental purpose of the law, which is that the taxpayer should be taxed on his actual income, Congress enacted into the Internal Revenue Code a standard to be observed by taxpayers as the basis for the returns to be made under the statute. Section 41 of the Internal Revenue Code provides: That the net income shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping books of such taxpayer, but if no such method of accounting has been so employed the computations shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. Thus, although the selection of a system of keeping his books rests primarily with the taxpayer, if the taxpayer's records are found to be inaccurate or not available or fail to clearly reflect his income, the Government is authorized by the statute I have just quoted to adopt a reasonable method of computation for ascertaining his taxable income. Various methods may be employed. In this case the Government has undertaken to establish the taxable income of the defendant by what is known as the net worth and expenditure method. The underlying theory of this method as employed in this case is that if a taxpayer's net worth at the beginning of a particular period is

greater than his net worth at the end [553] of the period and if such increment is not attributed to gifts, devises, loans or other non-income sources, the inference may be drawn that the increase in net worth plus the nondeductible expenditures made by the taxpayer during that period represents taxable income for the period.

The Government has placed before you evidence relating to the net worth of the defendant and his wife at the end of each of the years 1945, 1946, 1947 and 1948. A person's net worth at a given time is the difference between all his assets and all his liabilities. Loans receivable are to be considered as assets and loans payable are to be considered as liabilities in computing net worth.

Increase in net worth for any year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute the taxable net income of the defendant and his wife by this method, you should add their living and other nondeductible expenses for that year as shown by the evidence. These expenditures should be added because they are not represented in the assets which the defendant and his wife have accumulated and are not deductible expenses.

The law provides that a deduction shall be allowed for all the ordinary and necessary expenses paid or incurred in carrying on any trade or business.

The term ordinary and necessary expenses does not have any [554] specific definition but refers generally to expenditures which have a reasonable relationship to the carrying on of a business.

In using the net worth and expenditure method of computation and proof it is incumbent upon the Government to satisfy you beyond a reasonable doubt that expenditures made by the taxpayer for the years in question were from taxable earned income for each of the particular years and not from a surplus which the taxpayer had built up in previous years, or other non-taxable sources.

It is incumbent on the Government to satisfy the Jury beyond a reasonable doubt that the increased net worth of the defendant for each of the years in question, if such increase be proved, was built up out of earned taxable income for each of the prosecution years and did not come to either the defendant or his wife from gifts or inheritances or other non-taxable income.

The Government must also prove beyond a reasonable doubt that the increased net worth in evidence here covered by the indictment could not have come from income reported by the taxpayer and on which he paid income tax.

In a net worth case, attention is focused on the difference between the taxpayer's assets and liabilities as of the beginning and the end of a given prosecution year. The increase, if any is shown, may be inferred to be net income if [555] certain conditions are present. These conditions are:

1. That there is evidence of a possible source or sources of income to account for the expenditures of the increased net worth.
2. That there is a fixed starting point to which

the taxpayer's financial condition can be affirmatively established.

A starting point net worth must be established with reasonable certainty in order to rule out the possibility that the expenditures or the increased net worth were derived from prior accumulated funds or property, which, of course, could not represent income in the subsequent prosecution years.

Such a case is not based upon direct evidence but upon indirect or circumstantial evidence, or part direct and part circumstantial.

* * *

[Endorsed]: Filed December 27, 1954. [556]

CLERK'S CERTIFICATE TO
RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. Louis P. Lutfy, Defendant, numbered C-14525, Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said

case, and that the attached and foregoing copies of the criminal docket entries and minute entries are true and correct copies of the originals thereof remaining in my office in the City of Tucson, State and District aforesaid.

I further certify that said original documents and said copies of the criminal docket entries and of the minute entries constitute the record on appeal in said case as designated in the Appellant's Designation of Contents of Record on Appeal filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Indictment, filed February 26, 1953.
2. Defendant's Motion for Bill of Particulars, filed April 20, 1953.
3. Government's Bill of Particulars, filed April 24, 1953.
4. Minute entry of May 4, 1953. (Arraignment and plea.)
5. Minute entry of October 9, 1953. (Trial setting.)
6. Government's Amended Bill of Particulars, filed December 15, 1953.
7. Minute entry of December 23, 1953. (Order for filing of proposed amended Bill of Particulars as Bill of Particulars herein and trial resetting.)
8. Defendant's Motion for Further Particulars, filed January 25, 1954.
9. Government's Reply to Defendant's Motion for Further Particulars, filed February 8, 1954.

10. Minute entry of February 8, 1954. (Order striking Defendant's Motion for Bill of Particulars subject to reinstatement by either party.)

11. Minute entry of September 7, 1954. (Proceedings of trial.)

12. Minute entry of September 8, 1954. (Proceedings of trial.)

13. Minute entry of September 9, 1954. (Proceedings of trial.)

14. Minute entry of September 10, 1954. (Proceedings of trial.)

15. Minute entry of September 14, 1954. (Proceedings of trial.)

16. Minute entry of September 15, 1954. (Proceedings of trial.)

17. Minute entry of September 16, 1954. (Proceedings of trial.)

18. Verdict, filed September 16, 1954.

19. Government's Exhibits 1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 29, 30, 31, 32, 33, 34 and 38.

20. Defendant's Exhibits A, B, C, D, E, F, G, H and I.

21. Defendant's Motion for New Trial, filed September 20, 1954.

22. Minute entry of September 20, 1954. (Order granting additional time for Defendant to file supplemental grounds in support of motion for new trial and resetting for sentence.)

23. Minute entry of October 18, 1954. (Order denying Defendant's Motion for New Trial.)

24. Judgment, filed October 18, 1954, docketed October 18, 1954.

25. Order Granting Stay of Execution and Admitting to Bail on Appeal, filed October 18, 1954.
26. Notice of Appeal, filed October 18, 1954.
27. Docket entries of March 12, 1954, and October 18, 1954.
28. Minute entry of November 18, 1954. (Order extending time to file record on appeal to and including January 4, 1954.)
29. Order Extending Time for Docketing Appeal and Transmitting Record to and including January 17, 1955.
30. Designation of Contents of Record on Appeal, filed October 25, 1954.
31. Statement of Points upon which Defendant-Appellant Relies on Appeal, filed October 25, 1954.
32. Reporter's Transcript of Proceedings, Volume I, filed December 27, 1954.
33. Reporter's Transcript of Proceedings, Volume II, filed December 27, 1954.
34. Minute entry of January 10, 1955. (Order extending time for docketing Record on Appeal to and including February 1, 1955.)

I further certify that the Clerk's fee for preparing and certifying this said Record on Appeal amounts to the sum of \$7.20, and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court, at Tucson, Arizona, this 17th day of January, 1955.

[Seal]

WM. H. LOVELESS,
Clerk.

By /s/ CATHERINE A. DOUGHERTY,
Chief Deputy.

[Endorsed]: No. 14630. United States Court of Appeals for the Ninth Circuit. Louis P. Lutfy, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed January 20, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14630

LOUIS P. LUTFY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT RELIES ON APPEAL

The points upon which appellant relies in this appeal are as follows: (References are to original Reporter's Transcript.)

I. Court erred in refusing appellant's motion to strike all evidence of net worth and in submitting case to jury as a net worth case.

A. This was not a proper case for net worth proof.

1. Appellant kept a regular set of books of average quality (R. T. 404, 1. 7-24).

2. Every item of professional income entered in books. (R. T. 120, 1. 10-25).

3. Accurate books kept (R. T. 138, 1. 16-24).

4. Appellant stressed accuracy in keeping of books and records. (R. T. 122, 1. 15-17; 135, 1. 12-17; 138, 1. 3-7).

B. Government failed to meet established standards for proof of net worth.

1. Amount of cash available at beginning of period was not established beyond speculation.

(a) Court allowed government to engage in a fantastic process of computation (R. T. 199, 1. 19 to 201, 1. 22). See also (R. T. 199, 1. 1-18).

(b) Government's proof showed no competent corroboration of appellant's extra-judicial statement (if such was made), as to amount of cash available at the beginning of the prosecution period.

(c) Government's evidence tends strongly to show the probability that appellant may have had a much larger sum on hand December 31, 1945, than that allowed by Government's net worth computation.

(1) Cashed \$14,195.12 in Government bonds November 24, 1944. (R. T. 62, 1. 1-24.)

(2) No showing that appellant spent proceeds of Government bonds prior to December 31, 1945.

(3) In 1944, a loan of \$4,400.00 repaid to appellant (R. T. 296, 1. 23 to 297, 1. 2), and no showing that this cash had been spent.

(4) Government agent was unable to testify he had accounted for all appellant's assets at the beginning of the prosecution period. (R. T. 313, 1. 21 to 314, 1. 3.)

2. Government made no effort to consider non-taxable sources of income during prosecution years.

(a) No effort made to give consideration to unrepaid loan from a Mrs. Linsenmeyer in amount of \$3,500.00 in 1947. (R. T. 296; 345, 1. 4-16.)

(b) Government ignored assets in form of life insurance of \$45,000.00. (R. T. 347, 1. 16 to 348, 1. 5; 369, 1. 20 to 370, 1. 19.)

(c) Government ignored gifts of money received during prosecution period, (R. T. 312, 1. 10-24; 340, 1. 5-7) or sale of assets (R. T. 359, 1. 20 to 360, 1. 12).

3. Government's net worth evidence is fully reconcilable with full and true reporting of all income by appellant, and was fully answered. (R. T. 407; 409; 411, 1. 1-24; 414, 1. 15-23; 416; 417 and 418 to 1. 19; 418, 1. 20 to 421, 1. 9; 421, 1. 10-16; 422, 1. 4-17.)

II. The district court erred in the admission and rejection of evidence to the prejudice of appellant.

A. The Court erred in admitting over objection the following Government exhibits: No. 6, 9, 10, 13 and 27, for reason same were incompetent, irrelevant, immaterial, prejudicial, non-probative and outside the scope of the Government's bill of particulars and amendments thereto.

B. The United States attorney prejudiced the rights of appellant in calling as witnesses the following persons whose inability to give competent or credible testimony must have been known to him:

Robert F. Herre (R. T. 50-57) ; Clarence J. Beale (R. T. 32-88).

III. The district court, notwithstanding timely objections, failed to afford the appellant with the protective cautions in the admission of evidence offered by the government as outlined in *Holland vs. U. S.* (decided U. S. Supreme Court, December 6, 1954) and appellant was thereby deprived of his rights to due process of law and a fair and impartial trial.

A. Government agent volunteered numerous prejudicial statements that could not be guarded against by appellant. (R. T. 182, 1. 5-15; 183, 1. 7-8; 184 1. 10-15; 184, 1. 21 to 185, 1. 5; 188, 1. 8-24; 190, 1. 11-13; 196, 1. 18-25.)

B. District court allowed Government witness to broadcast opinions on technical legal questions, over objection, and thus the province of the jury was invaded. (R. T. 198-202, 1. 1; 206, 1. 7-20; 227, 1. 4-25; 234, 1. 21 to 335, 1. 4; 236, 1. 6-25; 239, 1. 7-17; 240, 1. 1 to 245, 1. 4.)

1. Government's witness was not qualified and no proper foundation of expertness established either in law or accounting. (R. T. 207.)

2. Government agent was permitted to mislead jury on subject of unreported income. (R. T. 240; 241; 268, 1. 13 to 269, 1. 25.)

IV. Court, over objection, permitted the Government to freely depart the scope of its bill of particulars, amended bill of particulars, and supplement thereto.

A. Especially was proof regarding depreciation, outside Government's specifications. (R. T. 261, 1. 20 to 262, 1. 5; 425, 1. 18 to 426, 1. 14.)

B. Court erred in admitting Exhibit No. 27 in evidence, over proper objection.

V. That the Court erred generally in overruling defendant's objections seeking to limit government's evidence to the scope of the bill of particulars, amendment and supplement thereto.

VI. That the Court erred in failing to grant defendant's motion to strike all evidence of the Government relating to defendant's net worth, including Exhibit No. 33.

VII. That the verdict of the jury is contrary to the weight of the evidence.

VIII. The jury's verdict is not supported by substantial evidence.

IX. That the Court erred in denying defendant's motion for acquittal made at the conclusion of all of the evidence in the case.

X. That the Court erred in denying defendant's motion for acquittal made at the conclusion of the Government's evidence.

Dated at Phoenix, Arizona, this 31st day of January, 1955.

/s/ DARREL R. PARKER,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 1, 1955.

No. 14,630

In the
United States Court of Appeals
For the Ninth Circuit

LOUIS P. LUTFY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Brief for Appellant

Upon Appeal from the United States District Court for the District of Arizona

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FILED

MAY 17 1955

PAUL P. O'BRIEN, CLERK

SUBJECT INDEX

	Page
Statement of Pleadings and Jurisdictional Facts.....	1
Jurisdiction of the District Court.....	5
Jurisdiction of This Court.....	5
Statement of the Case.....	6
Questions Involved—How Raised.....	11
Specifications of Error.....	12
Argument	15
Introduction	15
I. The Evidence in this Record is insufficient to meet established standards of proof to support conviction of income tax evasion based on net worth theory.....	16
II. The prosecution is limited in the presentation of evi- dence to the area embraced in the bill of particulars.....	24
III. Defendant's rights were prejudiced by the introduc- tion by the Government of improper and incompetent evidence and defendant was thereby deprived of a fair and impartial trial.....	26
Conclusion	43

TABLE OF AUTHORITIES

CASES	Pages
Berger v. U. S., 295 U.S. 78, 82; 55 S.Ct. 629, 630; 70 L.Ed. 1313	25
Capone v. U. S., 51 F.2d 609, 76 A.L.R. 1534.....	16
Friedberg v. U. S., 99 L.Ed. 140, U.S. *	15
Guzik v. U. S., 54 F.2d 618.....	16
Holland v. U. S., 99 L.Ed 127, 75 S.Ct., U.S. *	15, 16, 22, 23, 43
Land v. U.S. (C.C.A. 5th, 1949), 177 F.2d 346, 348.....	25
Smith v. U. S., 99 L.Ed. 143, U.S. *	15, 21, 22, 43
Sullivan v. U. S., 99 L.Ed. 152, U.S. *	15
U. S. v. Calderon, 99 L.Ed. 152, U.S. *	15, 21, 22, 43
U. S. v. Glasser (C.C.A. Ill.), 116 F.2d, 690, 702, Cert. denied 61 S. Ct. 835, 213 U.S. 551.....	25
U. S. v. Johnson, 319 U.S. 503, 87 L.Ed. 1546, 63 S.Ct. 1233.....	16

*Citations refer to 99 L.Ed Advance Sheet No. 3, dated December 20, 1954.

ENCYCLOPEDIAS AND TEXTS

31 C.J., p. 753, Sec. 310.....	25
42 C.J.S., p. 1101.....	25
42 C.J.S., p. 1103.....	25

RULES

Rule 37(a) (2) Federal Rules of Criminal Procedure.....	5
---	---

STATUTES

18 U.S.C.A. 3231.....	5
26 U.S.C. 145(b).....	1, 5
28 U.S.C.A. 41.....	5
28 U.S.C.A. 132.....	5
28 U.S.C.A. 1291.....	5

In the
United States Court of Appeals
For the Ninth Circuit

LOUIS P. LUTFY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief for Appellant

Upon Appeal from the United States District Court for the District of Arizona

STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

The appellant Louis P. Lutfy, hereinafter referred to as defendant as in the court below for the sake of convenience, is a physician and surgeon and practicing in the City of Phoenix, State of Arizona. Defendant was indicted February 26, 1953 (3-7)* on five counts charging violations of 26 U. S. C. 145(b), attempt to defeat and evade income taxes for the calendar years 1946, 1947 and 1948.

With respect to the years 1946 and 1947 wherein separate returns were filed by the defendant and his wife, Bertha A. Lutfy, defendant is indicted on two counts for

*Figures appearing in parentheses in this Brief refer to page numbers of the printed Transcript of Record and are inclusive.

each of these two years, Counts II and IV, respectively, charging that the defendant filed or caused to be filed false and fraudulent income tax returns for and on behalf of the said Bertha A. Lutfy (4-6). With respect to the year 1948 a joint return was filed by the defendant and Count V of the Indictment relates to the said return filed on or about February 8, 1949, being the tax return on behalf of himself and his wife for the year 1948.

Counsel for defendant promptly filed a motion for a bill of particulars (7-10) and a bill of particulars was promptly furnished by the Government (11-14), setting forth specifically the charge that certain specific sums of money constituting income was received by the defendant during each of the prosecution years from four sources, namely, interest, rental receipts, capital gains and business income, and which sums it is alleged were not reported by the defendant in the appropriate tax returns for those years. The bill of particulars set forth specifically that "It is not alleged that the defendant took deductions not allowed by law.", and respecting the Counts numbered II and IV, "It is not alleged that the defendant caused Bertha A. Lutfy to take deductions not allowed by law."

After arraignment on May 4, 1953 (15), wherein the defendant entered pleas of not guilty to all counts, there was a substitution of counsel for defendant and the cause was transferred to the Tucson Division for trial (15).

On December 15, 1953, the Government filed an amended bill of particulars (16) wherein the Government advised the defendant that the omitted income for the calendar years 1946 to 1948, inclusive, "* * * based upon annual increase in the defendant's net worth for the years 1946-1948, inclusive, plus expenditures in those years".

Defendant's counsel thereupon moved the court for an order requiring further particulars of the Government (17-20), and thereupon the Government made reply to the motion filing certain further particulars (20-22), wherein it was stated that all personal deductions for the prosecution years were allowed as claimed with the exception of medical expenses claimed in 1946 disallowed in part, and the theft of a Lincoln automobile claimed in 1947 disallowed in part.

The Government further replied that "All nondeductible personal expenses taken as business deductions have been disallowed." In this pleading the Government alleged respecting defendant's net worth, the following:

- "(a). Net worth, December 31, 1945. \$ 61,248.40
- (b). Net worth, December 31, 1946. 71,886.55
- (c). Net worth, December 31, 1947. 87,739.18
- (d). Net worth, December 31, 1948. 115,732.01" (21)

In this pleading the Government asserted that the defendant and his wife made the following expenditures:

"\$20,336.23 in 1946.
27,591.28 in 1947.
36,520.72 in 1948." (21)

In the trial of the case the Government's net worth statement (Government's Exhibit No. 33 in evidence) showed defendant's net worth as of December 31, 1945 in the sum of \$58,337.20, December 31, 1946—\$65,588.43, December 31, 1947—\$74,265.11, December 31, 1948—\$97,294.73.

Count I of the Indictment alleged the total tax due the Government to be the sum of \$2,239.44. The Government's Exhibit No. 34 in evidence showed the correct sum to be \$1,073.57.

Count II of the Indictment alleged a total tax liability of \$2,077.80. The Government's Exhibit No. 34 showed the amount to be \$950.70.

Count III showed the total tax liability to be \$3,349.76. The Government's Exhibit No. 34 showed the amount to be \$2,471.42.

Count IV of the Indictment alleged a total tax liability of \$2,931.53. The Government's Exhibit No. 34 showed the amount to be \$2,309.92.

Count V of the Indictment alleged a total tax liability of \$8,198.22. The Government's Exhibit No. 34 showed the amount to be \$6,362.20.*

The cause was tried in the Tucson Division before a jury between the following dates: September 7 and September 16, 1954 (23-37). The case was submitted to the jury on the net worth theory (445-448). The jury returned a verdict finding the defendant guilty on each of the five counts (37).

Defendant filed motion for new trial (37-40) which was by the court denied on October 18, 1954 (41-42). Judgment and sentence was rendered October 18, 1954, committing the defendant to the custody of the Attorney General for imprisonment for a period of eight months on each of the first four counts, said terms of imprisonment to run concurrently, and on Count V defendant was fined in the sum of \$5,000.00.

Upon timely application and the filing of a notice of appeal (45-46) the court granted a stay of execution and admitted the defendant to bail pending his appeal (44).

The court entered an order extending the time for filing the record on appeal to February 1, 1955 (42). Statement of

*Of the above sums Government's Exhibit 34 showed the following payments with respect to each of the five counts: Count I—\$248.88; Count II—\$153.88; Count III—\$626.03; Count IV—\$521.53; Count V—\$3,265.36.

points to be relied on by defendant in this appeal was filed in the district court October 22, 1954 (48-51) and a revised statement of points filed in this Court February 1, 1955 (453-457). Within the time provided by the order of the district court this appeal was perfected and the transcript of the record filed and docketed in this court.

JURISDICTION OF THE DISTRICT COURT

The district court had jurisdiction of this cause because it was a criminal case instituted by a Grand Jury Indictment (3-7) in the United States District Court for the District of Arizona, which charged the appellant with violations of Title 26 U.S.C. 145(b) and the violations charged are cognizable only by the United States Courts which have exclusive jurisdiction of crimes and offenses defined by Acts of Congress, and the commission of which are by law made criminal offenses against the authority of the United States. Jurisdiction of the District Court is invoked under the following statutes: Title 28 U.S.C.A. Sections 82, 132, and Title 18 U.S.C.A. Section 3231.

JURISDICTION OF THIS COURT

Jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C.A. Section 1291, and 28 U.S.C.A. Section 41.

The order of the court denying appellant's motion for a new trial and the judgment and conviction appealed from were entered and sentence was imposed on October 18, 1954 (41-43). Subsequently, the appeal was duly and timely taken and in the manner provided by Rule 37(a)(2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

A detailed statement of this case would run to unreasonable length, and therefore the statement which follows is greatly condensed and covers only those points which appear to be salient and relevant to this appeal.*

One of the witnesses for the Government was Mrs. Raye Way, formerly receptionist, medical stenographer and book-keeper for the defendant between September 1947 and May 1949 (97), and presently wife of the Justice of the Peace, Magistrate and Ex-Officio Coroner at Williams, Arizona (109). This Government witness testified that she kept the books of the defendant in his professional practice, and that she entered daily in the log book which he used for the keeping of his records each item of cash, each check received and each charged item (98), and that she kept a complete record in this log book (99). She further testified that at the end of each day she and the defendant together checked the entries in the daily log book for mistakes and when found such mistakes were corrected, and that defendant was very particular about such matters and in the performance of her duties stressed accuracy at all times (100, 111, 113). She further testified that she assisted Dr. Lutfy in the preparation of figures for his income tax returns (101-105), for the calendar years 1947 and 1948 (119-124).

Mrs. Way also testified that she had visited in the home of the defendant and had been surprised at the plain and modest conditions under which he lived (109). This witness also testified that she was familiar with the type of books kept by the defendant, having seen the same type of records in other doctors' offices (114), and that to the best of her

*The writer assumes that counsel for the Government will supplement this statement of the case in the event that the same is not sufficiently complete for his purposes.

ability she kept a full, true and accurate record of all professional income (115, 126).

This witness also testified that at no time did the defendant ever insinuate or suggest that any item of business or professional income ever be omitted or treated in any manner likely to conceal or deceive (125).

The Government brought to the stand Mr. Howard H. Whitsett (142), an Internal Revenue Agent of 14 years experience who had had a three year accounting course, but had never been a Certified Public Accountant (217-218). This witness related a detailed history of the investigation which he and others made of the defendant's books and records (145-156). This witness then presented to the Court a previously prepared and lengthy computation sheet, referred to in the record as defendant's net worth statement, being Government's Exhibit 33 in evidence (152-160). In answer to a question asking for an explanation of Whitsett's computations, referring to Exhibit 33 in evidence, the witness stated:

"From 1928 to 1938 there was no record of return on file." (163)

and over objection the Court allowed him to proceed to go into a system of computations by which the witness was allowed by the Court to compute the defendant's gross income from 1934 through 1945 and to estimate living expenses for those years (164-166), and the Court denied defendant's motion to strike all of these answers of the witness concerning prior years. The witness stated that the computation from prior years resulted in his arriving at the figure of \$1,000.00 cash on hand at the beginning of the prosecution period (166). In this connection the Government's proof had already shown that on or about Novem-

ber 24, 1944 the defendant had converted War Bonds into cash in the amount of \$14,195.12 (78), and the Government produced no evidence to show what became of this sum.

The Government's accountant admitted that he learned of the repayment in 1944 to the defendant of the sum of \$4,400.00 which he had previously loaned his mother (244), but no allowance was made for that in the net worth statement or any explanation of where that money went. Also the Government witness admitted that he learned of an unrepaid loan wherein the defendant, during the prosecution period, borrowed either \$3200.00 or \$3500.00 in cash from his mother-in-law, Mrs. Linsenmeyer (243-244, 289), but nothing appears in Exhibit 33 to indicate that any account was taken of this cash, and there is no indication from the evidence that any investigation was made by the Government to ascertain the truth of the facts, nor was there any reflection in Exhibit 33, or elsewhere, of any cash gifts to the defendant or his wife by Ottelia Linsenmeyer, who was, according to the Government's evidence, quite a wealthy woman prior to her death in 1951 and who made a habit of making gifts to the families of her children (57-59; 282-283), and in connection with which there was evidence of cash gifts averaging \$500.00 per year during the prosecution period (284).

Nor was there any account taken in the Government's Exhibit 33 of the sale of a piano in 1948, the proceeds of which was \$475.00 in cash (301).

During 1947 a Lincoln automobile belonging to the defendant was stolen and he claimed a deduction as a casualty loss in that year of his alleged cost of the automobile of \$6700.00, of which the witness Whitsett, in preparing his Exhibit 33, says, "I disallowed in that particular year." (199). In connection with this item the evidence was that

the London Assurance Company refused to pay the loss arising out of the theft of this automobile and that they were sued and defendant eventually prevailed in his suit (290), and upon receiving payment from the insurance company treated the proceeds thereof as income and paid taxes upon the sum recovered (233-234).

The Government witness, in preparing the net worth statement, Exhibit 33 in evidence, took no account of life insurance policies held by the defendant in the amount of \$45,000.00 (291) and apparently made no investigation to determine whether or not any of the funds used by the defendant during the prosecution years was obtained by surrender of any such policies in return for the cash values thereof. This Government witness, who was the only witness pertaining to the defendant's net worth, refused to affirm or deny that in the course of his investigation he had made to the defendant the following statement:

“You doctors are getting away with murder. I am going to take away all your deductions and let you fight to try to get them back.” (249)

The witness Whitsett treated two real estate transactions as short-term capital gains, taxable in the full amount (221-231), although the facts show that both transactions with the elements of ownership extended over a period of more than six months.

The witness Whitsett freely stated his opinions on matters both legal and factual and related hearsay testimony (148, 149, 150, 197-199, 200, 201, 230-231, 234-235, 241, 246).

The Court permitted the Government to go into the matter of depreciation schedules (see Government's Exhibit No. 27 in evidence) (213) and denied defendant's motions to strike or otherwise exclude testimony pertaining to

depreciation as being outside the scope of the bill of particulars (189, 190, 191).

Defendant presented the witness R. Dale Moser, a Certified Public Accountant (325), who testified that from his examination of the defendant's records that he would say that the defendant kept a regular set of books, and that the defendant's books were about average for a professional man in his position (336-337). He further testified that in 1946 defendant's books showed 2,382 cash transactions, in 1947 2,955 cash transactions and in 1948 3,891 such transactions (366), and that as for discrepancies out of the 3,891 cash transactions in the year 1948 he found 14 errors in the log book, consisting of information recorded on the patient's cards which had not been entered in the daily log book (434).

This witness testified that he had taken the Government's figures as set forth in Government's Exhibit No. 33 (342) and that as of the end of 1946, based on the Government's own figures, defendant would have \$2,244.22 available funds on hand over and above the income reported and the amount he had spent in the net gain of assets (343, 346). That as for the end of 1947, the second year of the prosecution period, defendant had available funds over and above enough to account for his net worth at the end of said year in the amount of \$5,025.35 (350); that as of the end of 1948, taking into account the entire three year prosecution period, the defendant had net additional funds available for the entire period of \$2,180.62 more than was necessary to arrive at the net worth as alleged by the Government (352-353).

This accountant treated both the real estate transactions, which the Government's accountant disallowed as long term capital gains, as such long term capital gains (346-347).

This witness also discussed the depreciation aspect of the

case and demonstrated that in each of the prosecution years the depreciation computed on the basis of the Government's cost figures amounted to a greater sum than that taken by the defendant. In the year 1946 the defendant could have claimed, by accepted methods allowable by the Government, \$120.56 more of depreciation than he actually did claim, and in the year 1947 he could have claimed \$1,302.25 more than he actually did claim, and for the year 1948, \$1,331.80 more than he actually did claim (362-365).

QUESTIONS INVOLVED—HOW RAISED

This appeal raises principally the following questions:

1. Did the district court commit error in denying defendant's motion for acquittal made at the conclusion of the Government's evidence?

2. Did the district court commit error in refusing defendant's motion to strike all evidence pertaining to net worth?

3. Did the district court err in submitting the case to the jury as a net worth case?

4. Did the district court err to the prejudice of the defendant in admitting the testimony of the witnesses McGurkin (53), Beale (58, 86), Fairfield (68) and Herre (71)?

5. Did the district court err to the prejudice of the defendant in admitting over objection Government's Exhibits No. 6, 9, 10, 13 and 27?

6. Was the defendant deprived of a fair and impartial trial by reason of volunteer statements and opinions injected by Government witnesses over defendant's objections, or of such character as could not be guarded against by objection on the part of defendant?

7. Did the district court err in receiving evidence offered on behalf of the Government which was outside the scope of the Government's bill of particulars?

The foregoing questions were raised in the course of the trial and proceedings subsequent thereto by objections to the reception of evidence, motions to strike evidence, a motion for judgment for acquittal at the conclusion of the Government's case and also at the conclusion of all the evidence in the case.

SPECIFICATIONS OF ERROR

I.

The district court erred in denying defendant's motion for acquittal made at the conclusion of the Government's evidence in the case, for the reason that such evidence was largely incompetent and was otherwise insufficient to establish the crime charged.

II.

That the district court erred in denying defendant's motion for acquittal made at the conclusion of all of the evidence in the case (444) for the reason that the evidence was largely incompetent and was otherwise insufficient to establish defendant's guilt as charged.

III.

The district court erred in denying defendant's motion to strike all evidence of defendant's net worth (275-278) for the reasons that the Government failed to meet established standards for proof of net worth in the following particulars:

1. The Court allowed Government witness to engage in fantastic process of computation, presumably to arrive at cash on hand for beginning of period (163-166).

2. Government's witness ignored \$14,195.12 in Government bonds cashed by defendant on or about November 24, 1944 (78).

3. Government witness ignored repayment to the defendant in 1944 of prior loan of \$4,400.00 (244).

4. Government witness made no effort to show what had happened to cash admittedly received by defendant in 1944 in the total amount of \$18,595.12.

5. Government's proof showed no competent corroboration of defendant's extra-judicial statement (if such was made) as to amount of cash available at the beginning of the prosecution period. (162, 165-166)

6. Government witness as to net worth unable to testify that he had accounted for all of defendant's assets at the beginning of prosecution period (260).

IV.

That the district court erred in submitting the case to the jury as a net worth case for the following reasons:

(1) Defendant kept a regular set of books of average quality (336-337).

(2) Every item of professional income was entered in the books (98, 115, 126).

(3) Defendant stressed accuracy in the keeping of books and records (100, 111, 113).

(4) True and correct books and records were kept and made available to the Government.

(5) Net worth evidence made no effort to give consideration to unrepaid loan from Mrs. Linsenmeyer in the amount of \$3500.00 in 1947 (244, 289).

(6) Government ignored assets in the form of life insurance in the sum of \$45,000.00 (291, 309).

(7) Government ignored gifts of money received during prosecution period (259, 284, 301).

V.

The district court erred in submitting this case to the jury on the net worth theory for the reason that the Government's net worth evidence was reconcilable with a full and true reporting of all income by the defendant and was fully answered by certified public accountant testifying on behalf of defendant (339, 340, 343, 345-346, 350-353, 360-362).

VI.

The district court erred in admitting, over objection, the following Government Exhibits Nos. 6, 9, 10, 13 and 27 for the reason that the same were incompetent, irrelevant, immaterial, prejudicial, of no probative value and outside the Government's bill of particulars and amendments thereto.

VII.

That the district court failed to afford the defendant a fair and impartial trial, or defendant's rights were prejudiced by the United States Attorney by calling as witnesses the following persons whose inability to give competent or credible testimony must have been known to the United States Attorney beforehand, but could not have been known to defendant's attorney: Clarence J. Beale (59-86), Robert F. Herre (71-77), John F. Fairfield (68-71).

VIII.

That the district court erred, notwithstanding timely objections, in permitting Government witness to volunteer numerous prejudicial statements that could not be guarded against by defendant and in allowing Government witness to broadcast opinions on technical legal questions and thus invade the province of the jury (148, 149, 150, 197-199, 200, 201, 230-231, 234-235, 241, 246).

IX.

The trial court erred, over objection and motion to strike, in permitting the Government to depart its bill of particulars, amended bill of particulars and supplement thereto, especially in regard to proof of depreciation and the admission in evidence of Exhibit No. 27 over objection (146-148; 174, 175-177; 179-187, 213).

ARGUMENT

Introduction.

This Honorable Court will observe that this appeal was instituted on October 18, 1954. Thereafter on December 6, 1954, the Supreme Court of the United States announced decisions in the following cases:

Holland v. U. S., 99 L.Ed. 127, 75 S.Ct., U.S.

.....;*

Friedberg v. U. S., 99 L.Ed. 140, U.S.;*

Smith v. U. S., 99 L.Ed. 143, U.S.;*

U. S. v. Calderon, 99 L.Ed. 152 U.S.;*

Sullivan v. U. S., 99 L.Ed. 159, U.S.*.

The occasion for the granting of writs of certiorari in the foregoing cases is stated by Mr. Justice Clark in *Holland v. U. S.*, supra, page 131:

“In recent years, however, tax evasion convictions obtained under the net worth theory have come here with increasing frequency and left impressions beyond those of the previously unrelated petitions. We concluded that the method involved something more than the ordinary use of circumstantial evidence in the usual criminal case. Its bearing, therefore, on the safeguards traditionally provided in the administration of criminal justice called for a consideration of the entire

*Citations refer to 99 L.Ed. Advance Sheet No. 3, dated December 20, 1954.

theory. At our last Term a number of cases arising from the Courts of Appeals brought to our attention the serious doubts of those courts regarding the implication of the net worth method. Accordingly, we granted certiorari in these four cases and have held others to await their decision."

While it appears that the decisions in the above cases have to an extent disposed of some of the points made in the defendant's motion for a new trial and statement of points relied upon on appeal in the case at bar, there remain substantial questions arising out of the particular facts of this case upon which this defendant is entitled to review by this Court.

I. The Evidence in This Record Is Insufficient to Meet Established Standards of Proof to Support Conviction of Income Tax Evasion Based on Net Worth Theory.

(Specifications of Error Nos. I, II, III, IV and V)

In the case of *Holland v. U. S.*, supra, 132, 133, 134, 135, the Supreme Court discussed at some length the dangers inherent in the net worth theory of proof in criminal prosecutions for attempted evasion of income taxes, and commented that although the net worth method is useful to the Government and has come into wide use,

"Nevertheless, careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use." (Emphasis supplied.)

Contrasting the problems of the use of this method in such cases as *Capone v. U. S.*, 51 F.2d 609, 76 A.L.R. 1534, *Guzik v. U. S.*, 54 F.2d 618, *U. S. v. Johnson*, 319 U.S. 503, 87 L.Ed. 1546, 63 S.Ct. 1233, with its use in the less spectacular and more ordinary income tax evasion, the Court said:

“ * * and its use in the ordinary income-bracket cases greatly increases the chances for error. This leads us to point out the dangers that must be consciously kept in mind in order to assure adequate appraisal of the specific facts in individual cases.” (Emphasis supplied.)*

In discussing what the court describes as a “favorite defense”, namely the claim of the taxpayer that he had substantial cash on hand at the beginning of the prosecution period available for expenditure during the prosecution period, the Court points out that frequently the Government agents obtained “leads” indicating specific sources from which the cash has come, and with reference to the duty of the Government to investigate such leads, said:

“Were the Government required to run down all such leads it would face grave investigative difficulties; still its failure to do so might jeopardize the position of the taxpayer.” (Emphasis supplied.)

Concerning an additional danger involved in this method for the innocent defendant, the Court said:

“As we have said, the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously, such an assumption has many weaknesses. It may be that gifts, inheritances, loans and the like account for the newly acquired wealth. There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.” (Emphasis supplied.)

The Court also recognizes the difficulty which would confront many honest taxpayers in the matter of trying to explain the increase in his net worth if required to do so:

“ * * he may be entirely honest and yet unable to recount his financial history. In addition, such a rule would tend to shift the burden of proof. Were the taxpayer compelled to come forward with evidence, he might risk lending support to the Government’s case by showing loose business methods or losing the jury through his apparent evasiveness. Of course, in other criminal prosecutions juries may disbelieve and convict the innocent. But the courts must minimize this danger.”* (Emphasis supplied.)

The Court also had a special warning applicable to the case at bar where the books and records of the taxpayer appear correct on their face:

“But when the Government uses the net worth method, and the books and records of the taxpayer appear correct on their face, an inference of willfulness from net worth increases alone might be unjustified, especially where the circumstances surrounding the deficiency are as consistent with innocent mistake as with willful violation. On the other hand, the very failure of the books to disclose a proved deficiency might indicate deliberate falsification.” (Emphasis supplied.)

The Court also recognized that a realistic evaluation must be made of any alleged statements made by the taxpayer to revenue agents in the course of their investigation, saying:

“But when a revenue agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth. Moreover, the prosecution may pick and choose from the taxpayer’s statement, relying on the favorable portion and throwing aside that which does not bolster its position. The problem of corrobora-

tion, * * * therefore becomes crucial." (Emphasis supplied.)

The Court's general discussion of the net worth method is summarized as follows:

*"While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. * * * Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute."*

Applying some of these principles to the case at bar, counsel wishes to point out to the Court that according to the Government's evidence the defendant, on or about November 24, 1944, converted to cash Government bonds in the amount of \$14,195.12 (78). The evidence also disclosed that in 1944 the mother of the defendant repaid to him a loan which he had previously made to her and he thereby received cash in the amount of \$4,400.00 (244).

This made a total of \$18,595.12 in cash which the evidence definitely showed to be in the hands of the defendant in the year 1944. The Government not only made no effort to show what had happened to this cash or to show that the defendant did not have the cash, or a substantial part of it, on hand at the beginning of the prosecution period and expended it during the prosecution period, but, on the contrary, the Government, ignoring this very substantial sum of cash held by defendant in 1944, undertook to trace an income tax history from 1928 to 1945, in the process of which Exhibits 6, 9, 10, 11, 13 and 14 were introduced in evidence. Exhibits 6 and 13 were certificates of income tax

payments and assessments over this long period of years. Exhibit 6 was received by the Court over objections of counsel (54), and the same is true of Exhibit 9 (96). An ancient bank ledger sheet constituting Exhibit 10 was admitted over objection of counsel (70-71); likewise the Exhibit 13 (72-74).

Yet, on the basis of these Exhibits 6 and 13, the Court, in the face of objection of counsel, allowed the Government witness Whitsett to engage in a fantastic process of computation for the purpose of ascertaining by artificial means certain unknown facts which, in the witness's opinion, thereby were ascertained relating to defendant's gross income from 1928 through 1944 (162-165). Motion to strike all of this evidence was denied by the Court (166). It must be obvious that this process of computation could have no possible value directly or indirectly in the face of admitted cash in hand in 1944 of more than \$18,000.00. The only theory upon which the evidence could possibly have been introduced was to corroborate the Government agent's claim that the defendant had made extra-judicial statements establishing the amount of cash available at the beginning of the prosecution period in the sum of \$1,000.00 (162, 165-166). It is not apparent how his income tax payments during the years 1928 to 1944, inclusive, even though translated by the Government agent into terms of gross income less living expenses (which were, of course, sheer opinions on the part of the Government witness concerning matters about which he could not possibly have any knowledge), would have any relevancy in view of the established fact that the defendant in 1944 had \$18,595.12 cash in hand, and the Government was unable to show what had happened to this money.

The facts in this case are utterly different than in the *Smith* and *Calderon* cases, *supra*, with respect to corroboration of extra-judicial statements concerning cash on hand at the beginning of the period. In neither of those cases was there any such evidence respecting cash in the hands of the defendant shortly before the beginning of the prosecution period. In the light of the admitted existence of the large sum of cash in the hands of the defendant in 1944, it is impossible to understand the relevancy of Exhibits 6 and 13, or of the agent's testimony concerning income tax payments and probable gross income and expenses of the defendant during the years 1928 to 1944, inclusive, *except upon the theory that it would greatly prejudice the jury against the defendant.*

It is the opinion of counsel that the defendant was greatly prejudiced by this testimony and that its having been received by the Court and the Court having declined to strike it that the defendant was precluded from having a fair or impartial trial. In this connection it is difficult for an appellate court to fully understand the thoroughly sinister implications of such testimony coming from the mouth of a Government agent, or to understand the impression that it makes upon twelve ordinary laymen.

In this instance the Government certainly had a duty under the burden of proof rule to show the disposition of the whole or a substantial part of this cash which came into the hands of the defendant in 1944 prior to the beginning of the prosecution period, and to show that that cash, or a substantial part of it, did not account to some extent for the apparent increase in his net worth during the prosecution period, and under the circumstances could not provide any corroboration for the defendant's alleged extra-judicial statement concerning cash on hand at the beginning of 1946,

and under the rule announced in *Smith v. U. S.* and *U. S. v. Calderon*, supra, the judgment of the lower Court should be reversed upon the foregoing ground alone.

It is contended that the district court erred in submitting this case to the jury as a net worth case. The evidence established that the defendant kept a regular set of books of average quality (336-337). The Government's evidence showed that every item of professional income was entered in the books of the defendant (98, 115, 126). The Government's evidence showed that the defendant, in his relations with his office bookkeeper, stressed the importance of accuracy in the keeping of the books and records (100, 111, 113), and that true and correct books and records were kept and made available to the Government.

The Government made little effort in its investigation to trace even recent sources of non-taxable income about which it's agents had knowledge and which was received by the defendant during the prosecution period. No allowance was made for an unrepaid loan received from a Mrs. Linsenmeyer by the defendant in the amount of \$3200.00 or \$3500.00 in 1947, nor was any effort made by the Government agents to verify the fact that such loan had been given to the defendant (244, 289).

The Government investigators apparently brushed aside evidence of gifts of money received by the defendant or his wife during the prosecution period (259, 284, 301).

The Government investigators ignored assets in the form of life insurance, consisting of policies which the defendant had maintained for years and which presumably would have considerable cash value, the principal sum of which aggregated approximately \$45,000.00 (291, 309). These are not the kind of "leads" spoken of in the case of *Holland v. U. S.*, supra, 133, by Mr. Justice Clark when he said:

"Sometime these 'leads' point back to old transactions far removed from the prosecution period. Were the Government required to run down all such leads it would face grave investigative difficulties; still its failure to do so might jeopardize the position of the taxpayer." (Emphasis supplied)

These clues were based upon transactions of comparatively recent origin or assets recently held by the defendant and were perfectly susceptible to investigation. The duty of pursuing these leads had no relationship to the "investigative difficulties" referred to by the Supreme Court in tracking down ancient clues.

Counsel respectfully urges to this Court that the Government neglected the duty which is consistent with the burden of proof resting upon the Government in this case, and in the words of the Court in *Holland v. U. S.*, supra:

" * * its failure to investigate leads furnished by the taxpayer might result in serious injustice."* (Emphasis supplied.)

Is this not a proper case for the application of the procedure suggested by Mr. Justice Clark in *Holland v. U. S.*, supra, page 137, when he said:

"When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done." (Emphasis supplied.)

II. The Prosecution Is Limited in the Presentation of Evidence to the Area Embraced in the Bill of Particulars.

(Specifications of Error Nos. VI and IX)

It will be noted that in the case at bar the Government on two occasions filed bills of particulars pursuant to orders of the Court (11-14, 20-22) and on one occasion voluntarily made and filed an amended bill of particulars (16).

An examination of these documents discloses a continuous process on the part of the Government of shifting its position, changing its theory of the case, changing its computations, only to have such computations further changed in the trial of the case.

It is the contention of counsel that nowhere in the particulars set forth by the Government is there any indication that the Government relies for conviction of the defendant upon the charge of tax evasion by means of willfully taking improper deductions or improperly computing depreciation reserves, and that in the introduction of such evidence over objection of counsel, and in denying motions to strike such evidence the district court allowed the Government to freely depart from the field of proof embraced in its bill of particulars, and in so doing committed reversible error.

The general rule is well stated as follows:

“After the filing of the bill of particulars the state is confined in its proof, it is held, to the items therein set out, although it is held on the other hand that, where an information is sworn to positively, its scope is not limited or controlled by the fact that it is accompanied by a bill of particulars. In any event, any evidence otherwise competent tending to establish the transaction set forth in the bill of particulars is admissible. The right of the defendant to rely on a bill of particulars as limiting the scope of the evidence may be waived by failure to call attention thereto until the close of the argument or the trial. A bill of particulars

as to one count does not limit the scope of the evidence as to other counts.”

31 C. J., p. 753, Sec. 310.

“A bill of particulars ordinarily is not a part of the indictment or information although the prosecution usually is confined in its proof to the transactions set out in the bill.” (Emphasis supplied)

42 C. J. S., p. 1101.

“Limitation as to proof. After the filing of the bill of particulars the prosecution is confined in its proof to the items therein set out, * * *”

42 C.J.S. p. 1103.

In the case of *U. S. v. Glasser*, (C.C.A. Ill.) 116 F.2d 690, 702, Cert. denied 61 S.Ct. 835, 213 U.S. 551, which was a conspiracy case in which the bill of particulars set out certain specific overt acts, the Court said:

“The object of the bill of particulars is to give the defendant notice of the specific charges against him and to inform him of the particular transactions in question, so that he may be prepared to make his defense. Its effect, therefore, is to limit the evidence to the transactions set out in the bill of particulars.”

The case of *Land v. U. S.* (C.C.A. 5th, 1949), 177 F.2d 346, 348, held that proof of a date at slight variance with the bill of particulars not sufficient to justify a reversal.

In *Berger v. U. S.*, 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1313, the rule is stated:

“* * * that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial.”

III. Defendant's Rights Were Prejudiced by the Introduction by the Government of Improper and Incompetent Evidence and Defendant Was Thereby Deprived of a Fair and Impartial Trial.

(Specifications of Error Nos. VI, VII and VIII)

In connection with the testimony of the witness McGurkin (53-56), the Court accepted the offer of Government's Exhibit No. 6 (54) over objection, although the Court did sustain objections as to questions requesting the witness to relate the contents of the exhibit. The exhibit was a certificate of taxes and assessments of the defendant for a long period of years prior to the prosecution period. Aside from the fact that the exhibit was actually not properly identified, the harm done by admitting the exhibit was in no wise cured by sustaining objections to the witness's attempt to detail the contents of the exhibit verbally.

In connection with the Government's witness Clarence J. Beale (59-68, 86-96), this witness was brought on by the Government to present testimony relating to the defendant's earnings from the United Verde Extension Mining Company during the years 1934 and 1935 when he was employed as a company doctor (65). The witness related that although he did not keep the payroll record of the defendant's employment and could not find such payroll records, he had found a card on which there were certain entries in the handwriting of a deceased employee of that company whose handwriting he recognized pertaining to defendant's earnings with the company during the period in question (63, 65, 91).

This exhibit was identified as Government's Exhibit No. 9 and was objected to on grounds of competency and irrelevancy (60-63). The witness admitted that the actual payroll records which could not be found would have to be consulted

in order to verify the correctness of the entries on Exhibit 9. Notwithstanding renewal of the objection to Exhibit 9 (82), the said exhibit was admitted by the Court for "what it may be worth so far as it goes" (96).

The Government produced a witness by the name of Robert F. Herre, a special agent attached to the Bureau of Internal Revenue at St. Louis, Missouri, and who had held that position since the spring of 1948. This witness was a man who had never seen the defendant until the date of the trial and had at no time in his life ever had any conversation with the defendant (77). This witness was strictly a *hearsay* witness. He had no competent evidence to offer, as must have been apparent to the United States Attorney prior to having the witness sworn. An example of the type of evidence offered, which, by the way, pertained to the period when the defendant was in college or medical school, in St. Louis, is illustrated as follows:

"Mr. Parker: I am reluctant to suggest that we are now approaching the ridiculous. This covers a period when he was in college, way back in the 1920's before he ever started any professional practice in medicine. I fail utterly to see the materiality of it. I assume that it is offered on the theory that it is prejudicial. I know of no other theory upon which it could be offered.

Mr. Royston: I will assure the Court it isn't offered on that theory. It may seem ridiculous, but the only way I know to conduct this type of case is to go back and cover any period in which the defendant might have had any substantial amount of income. Even though he was in college or internship, other than this there is no way to show he may have had any income, he may have been making any fabulous amount so far as we know.

Mr. Parker: This doesn't show what his income was.

Mr. Roylston: It shows he didn't file a tax return.

Mr. Parker: Well, now, we are debating over this exhibit and you are now stating to the jury what you think it shows. I don't recall filing a tax return when I was in college either. I don't know what that has to do—

Mr. Roylston: If it please the Court—

Mr. Parker: I doubt if Mr. Roylston filed a tax return while he was in college.

Mr. Roylston: That is correct.

Mr. Parker: But I don't think I would suggest that is material whether or not he properly filed for 1953.

Mr. Roylston: If we are trying to establish my net worth in 1953 it certainly would be material whether I had any income a few years ago or any substantial income. It is offered solely for that basis, to overcome the probability of any substantial income during those years which might account for this great increase in net worth in later years.

Mr. Parker: I submit it doesn't prove anything.

Mr. Roylston: It is offered.

Mr. Parker: He may have had a wealthy family and his earnings wouldn't make any difference. I don't think it is of any great significance, your Honor. It seems to me it goes far afield. If the Court feels it has any probative value, the Government is being deprived by not having this in. I am not going to object further to it but I am at a total loss to understand—

The Court: I don't know at this time whether it will be worth anything to the jury. However, I take it there will have to be a great deal more evidence before anybody can determine that. I am going to *admit it because I don't think there is any great prejudice*. I don't see how there could be. That is 13 in evidence. (Emphasis supplied.)

(Government's Exhibit 13 marked in evidence.)

Q. (By Mr. Roylston): Mr. Herre, in connection with your investigation what was the next thing you did?

A. I contacted the St. Louis University Medical School and searched their records for anything that would be of significance in this case.

Q. For what particular years was that to cover?

A. That was to cover the years October, 1928, to June, 1932.

Q. Did you find any evidence of employment during the school years?

A. No.

Q. What was the next thing you did in this investigation?

A. I determined the place of abode of Mr. Lutfy at the time he was attending St. Louis University. During part of that time he was staying at 3515 Park Avenue, which was a rooming house.

Q. All right, sir, and what else?

Mr. Parker: I take it, if your Honor please, this must be all hearsay. I don't see how it could be otherwise.

The Court: Are you objecting to it?

Mr. Parker: I do.

The Court: The objection will be sustained.

Q. (By Mr. Royston): What was the next thing you did in your investigation, Mr. Herre?

A. All of the banks in St. Louis and all of the banks in St. Louis County surrounding the city of St. Louis were contacted to determine whether or not they had any business transactions of any kind whatsoever with Lutfy.

Q. What period of years was that to cover?

A. That covered the period 1928 to 1933.

Q. Were you able to discover any records in the banks in that area?

A. There were no records.

Mr. Parker: Just a moment. The further objection on the ground it is hearsay.

The Court: The objection will be sustained. That's not proper, Mr. Royston, to have a witness come here

and testify as to the existence or nonexistence of records when he has just gone in there and inquired. The jury will disregard the last answer of the witness.

Mr. Royston: If it please the Court, it is my understanding that the only way the Internal Revenue could obtain any of those records was inquire for the specific records and if the banks report they don't have those records the only thing we can do is produce the agent to testify to that fact.

The Court: No, you can produce the people at the banks. They are the ones that have the knowledge. What they tell this witness is strictly hearsay. How would counsel cross-examine a witness who appears as this one does. All he says is, 'They told me they didn't have them.'

Mr. Royston: Yes, sir.

The Court: Assuming counsel should have reason to believe there were some records, how in the world could he cross-examine this witness. If you had somebody from the bank there is a very effective way of cross-examining them.

Mr. Royston: There was about fifty banks in the area and I didn't think it would be incumbent for us to bring a representative from each bank to state there were no records.

The Court: The fact it may be burdensome, Mr. Royston, it isn't any basis for hearsay evidence.

Mr. Royston: All right, sir, I won't let it go any further.

Q. (By Mr. Royston): Did you do anything further in your investigation, Mr. Herre?

A. The records of the city of St. Louis and St. Louis County pertaining to property transactions, liens, mortgages, chattel mortgages, were searched in an effort to find the name of Lutfy.

Q. Did you search those records yourself?

A. I personally searched the records.

Q. What were the results of your search?

A. They were negative.

Q. You found no record?

A. I found no record of Lutfy.

Mr. Royston: Cross-examine." (72-77)

The Government then brought on the witness John L. Fairfield (68-70). This man had held the position of Manager of the Verde Valley Branch of the Bank of Arizona for three years prior to testifying (69). The two branches of this bank, namely, the one at Cottonwood where this witness was manager, and a branch at Clarkdale, a neighboring town, had been consolidated, and the witness testified that he had found an old ledger sheet bearing the name of the defendant in the records of the Clarkdale branch of the bank, and this ledger sheet was offered as Government's Exhibit 10 and received in evidence by the Court, over objection, with the following words:

"It will be admitted for whatever it may be worth."
(Emphasis supplied.)

The Government's star witness was Howard H. Whitsett, a revenue agent from the Phoenix office, and this witness frequently volunteered statements which were either calculated to create prejudice or at least had that effect. This witness also freely broadcast opinions concerning the facts, both evidentiary and ultimate. The following excerpts from the testimony of this witness illustrate the matters referred to:

"A. I asked him where the rest of the costs were that went to make up this \$30,000. He said that after the office building was built he had some changes and additions to things and took me around the office and showed me a new drinking fountain, he had to have a metal door put in the X-ray room and a special type of

plate for his X-ray room; a few small items but didn't, to my mind, add up to \$9,000.

Mr. Parker: *I move to strike the last statement of the witness.*

The Court: *It may be stricken, that part of the them would add up to \$20,000 as claimed.*" (Emphasis supplied.) (147)

"A. Yes, I asked him about medical equipment, new, as \$13,000, and X-ray equipment listed as \$7,000.

Q. Did he reply to that question?

A. *He had very little in his files to substantiate that total of \$20,000; he again took me through the office and showed me some medical instruments—"this one cost \$300, this one \$500, you can see how much I have. It amounts to quite a bit of money."* I asked him if he had anything to show me when those were purchased to prove they hadn't been deducted as expense in the year in which they were purchased and not capitalized, and since he didn't have it on hand at that moment, I would have to get the bills and statements from the various surgical supply houses, so that we could verify the figure and check it against the expense accounts he had listed for those years *and for the year they had already been deducted as expense*, and if the total of them would add up to \$20,000 as claimed." (Emphasis supplied.) (148)

"* * * I went to the banks and totaled the bank deposits for the two or three years, including '47—'46, 47 and '48, to see how close his total bank deposits came to his total receipts as reported on the return, *and they were somewhat larger*. It was at that time that I stopped my investigation and waited until we could have a joint investigation with the Intelligence Unit.

Q. Explain a little further what you mean by 'joint investigation'; just what that is?

Mr. Parker: I anticipate the witness is about to express his opinion about the case, what the agent did,

and thereupon having arrived at a conclusion he turned it over to somebody else. I take it this witness has probably testified in many courts and understands that the defendant should not be prejudiced by his opinions regarding the merits of the case.

Mr. Royston: I will withdraw that question.

Q. You stated that you stopped your investigation until there could be a joint investigation with the Intelligence Unit?

A. Yes.

Q. What is the Intelligence Unit?

A. The Intelligence Unit is the branch of the Treasury Department that does the investigation in the *cases of fraud* or——

Mr. Parker: If the court please, the witness is now stating his opinion about the case.

Mr. Royston: He is stating what the Intelligence Unit is.

Mr. Parker: It is immaterial.

The Court: It may stand." (Emphasis supplied.) (149-150)

"Q. What were the results of your investigation in connection with those four different methods of bookkeeping?

A. We found names and amounts on the deposit tickets we didn't find on the log book or on the patient's cards or on the receipt books. We found names in the log book we didn't find on the deposit tickets or on the patient's cards nor on the receipt books. We found names on the patient's cards, we found names and amounts, we didn't find were on the log book or were on the bank deposit tickets; and it was at that time that we discussed this with the Doctor and he said that evidently the log book was not complete, as we showed him patient receipts that weren't on it. He had destroyed some of the patient's cards that weren't regular patients and the receipts were only made out for the credits received directly into the office, not

from mail receipts; so that no one record was complete enough to be positive that that was the entire receipts from the practice; and it was at that time we were forced to proceed on the net worth basis of arriving at the Doctor's income for the years in question." (152-153)

As an illustration of the sinister atmosphere which the witness Whitsett apparently sought to create are the two contrasting versions of testimony concerning a letterhead and trivial bank account which the defendant had in the name of "Phoenix Sport Shop". Government's witness Whitsett gave the following version of the matter, loaded as it is with overtones of accusations of attempted concealment aimed at the defendant:

"Q. Did you have an further discussion with Dr. Lutfy at that time concerning any books or records of the Phoenix Sport Shop?

A. He had a file of correspondence, but there was no book—we had no record of—a complete record of receipts. We asked him if he had a bank account and he said, 'Yes, he had a bank account in the Bank of Douglas in the name of Phoenix Sport Shop.' Up to that time we asked him if he had any other bank accounts and he said, 'No.' We had all the records of the bank accounts he had but there was none. We were unable to get any clear listing of the purchases or sales to this Phoenix Sport Shop or Dr. Lutfy Company.

Q. After Dr. Lutfy told you he was the Phoenix Sport Shop, did that enter into your consideration whether you should resort to the net worth method of computation in this?

A. Yes. We had no way of figuring whether there was any income from that at all because there were no records whatsoever.

Q. You stated that you resorted to the net worth method of computation after you examined the Doc-

tor's books and records and had discovered this Phoenix Sport Shop. Explain to the jury what you mean by the net worth method of computation." (154-155)

The wife of the defendant, Bertha A. Lutfy, explained the matter in the following language:

“Q. Now, Mrs. Lutfy, you know about the Phoenix Sport Shop?

A. Yes.

Q. I believe there is an exhibit here in the form of a letterhead introduced by the Government. I don't believe this is the one. I thought the sport shop letterhead had been introduced. Well, tell me this, do you know how and for what purpose the business title or name Phoenix Sport Shop was created or originated?

A. Yes.

Q. Will you state to the jury what that was?

A. Well, I wanted to go in business and at the time I wanted to go in the import and export business because I had connections with an importer and exporter in San Francisco who is a friend of mine. Then you couldn't get the things at that time, you just couldn't get the merchandise, so my husband decided he wanted to have a sport shop. Instead of an import and export he would have a sporting goods shop. That is how this started, the Phoenix Sporting Goods.

Q. Did he ever, besides printing letterheads, did he ever actually open the sporting goods store?

A. No.

Q. Why didn't he, if you know?

A. You couldn't get anything. The good things you couldn't get.

Q. Did he maintain those letterheads over the years of '46, '47, and '48?

A. He had them at that time.

Q. Do you know what use he made of that firm name, that business name during that period?

A. He bought several guns for relatives and friends.

Q. Buy any for himself, do you recall?

A. Yes.

Q. How many, do you know approximately?

A. I would say, probably, two of them.

Q. Two?

A. Yes.

Q. Would you have any idea how many he bought for friends?

A. I never kept track, but I would say not more than six or eight.

Q. Mrs. Lutfy, was there any advantage, to your knowledge, in making these purchases for friends or for yourself in the name of the Phoenix Sport Shop?

A. There was a big saving. He got them wholesale.

Q. He got them wholesale. Do you know of your own knowledge whether or not he made any profit on guns that he purchased for friends?

A. No, he didn't.

Q. He did not?

A. No. He would usually show them the statement." (302-303)

On cross-examination Government's witness Whitsett admits that defendant did explain to him rather fully the purpose of establishing the name "Phoenix Sport Shop" and the extent of its activities (254).

The prejudice created by Whitsett was further aggravated by the ruling of the Court denying defendant's objection to having the U. S. Attorney simply turn this professional witness loose without the necessity of eliciting the testimony by interrogation:

"Q. (By Mr. Roylston): Now, Mr. Whitsett, in regard to this net worth statement, Government's Exhibit No. 33, will you start out from the very first of that and explain what the different items are on it and

how you arrived at those figure, and as we go along, there will be a few items I want to ask specific questions about, but if you start under assets and explain how you set it up and tell us what each item is?

Mr. Parker: Although it may be a little bit slower, it would be far easier to make intelligent objections if this could be by interrogation rather than turn the witness loose and say, 'go ahead, say anything you want to about this exhibit.' It is rather a long one.

Mr. Royston: He can talk about anything on there, and anything else I will interrupt.

The Court: I will permit you to proceed as proposed. However, if the witness goes beyond what he has been asked, counsel can object and if that happens we can probably do it by question and answer." (160-161).

A particular prejudicial and whimsical accumulation of opinions voiced by Whitsett on matters of which he could not possibly have knowledge is found in the following:

"* * * On 1934 income maximum without paying any tax would be \$1,111.11. 1935 on tax paid, \$82.56, the maximum amount of income would be \$34.04, \$4,400. In 1936 there was no tax. The maximum amount of income was still the same, \$1,111.11. In 1937 the Doctor was married and had the additional exemption of his wife and he paid no tax. The maximum amount of net income would be \$1,944.44. In 1938 he paid no tax. The maximum amount of income would be \$2,777.77. In 1939 he paid tax of \$7.33, and at that time he had one child. The maximum amount of income would be \$3,452.83. In 1940 he paid no tax. The maximum amount of income was \$2,744.44. In 1941 he had two children and the tax paid was \$44.57. The maximum income would be \$3,793.61. In 1943 he had three children and the maximum amount of income for that year was \$2,350, computed in conjunction with the '43 return. In 1943 we had his return and he reported an income of

\$6,220.80. In 1944 we had his return and he reported income of \$9,779.57. In 1945 we had his returns showing his income at \$6,030.98. The total from 1934 to 1945 was \$44,721.10. *I then applied an estimated living expense against this income of \$1,000 a year for the years 1934, 1935 and 1936. He was married in 1937 and I allowed \$1,500 living expenses; 1938, \$1,600; 1939 he had one child and it raised it to \$1,800; 1940 to \$1,800; 1941 with three children, \$2,000; 1942 to \$2,400; and for '43 and '44, \$3,600 each year. In 1945 when he had his checks we made an analysis and arrived at personal checks of \$6,842.02. The total living expenses for those years, '34 to '45, \$28,142.02. Taking these estimated living expenses for those years away from the maximum income of \$44,000, left a balance available for investments of \$16,579.08, and the total net worth we have as of 12-31-45 on page 3, total of the first column is \$58,337.20, and that discrepancy between the maximum amount available and the amount of assets on hand we allowed the \$1,000 cash that the Doctor estimated he would have on hand as of that date.*

Q. All through this method of computation which you just described, you arrived at the \$1,000 figure, which is on page 1, independent of the Doctor's own statement of the estimate?

A. Yes.

Mr. Parker: If your Honor, please, at this time we move to strike all of that answer because it is evidenced he dreamed it up out of his imagination. It is obvious. He doesn't state he knew what the Doctor's living expenses were.

The Court: We end up with a result where he says he went along with the Doctor. I mean, there is really no calculation in that. When he is all through, he ends up with the statement that in taking all these into account he went a long way. He went along and allowed the Doctor \$1,000 and \$500 he claims.

Mr. Royston: Yes, sir. That is what we were getting at. This \$1,000 on here, it is to establish a starting point.

The Court: It may stand." (Emphasis supplied.) (164-166.)

With respect to Government's Exhibit 33 which is the Government's net worth figures (copies of which were supplied to each individual juror), the following is an example of the extent to which this witness went in making his own adjustments in accordance with his tastes in the figures used in preparing the net worth computation:

"Q. Did you make any adjustment on the claimed depreciation as far as your computation is concerned?

A. Yes. In the years when he had one automobile, I adjusted it to 80% business and 20% personal.

Q. To 80% business and 20% personal use?

A. That is right.

Q. These are the years when he had one automobile?

A. Yes." (174-175)

In a similar vein is this witness's treatment of the casualty loss on the Lincoln automobile which was stolen in late 1947:

"Q. The next item under Living Expenses is Lincoln Continental Convertible, and under the year ending '47 you have listed \$5,420. Will you explain why this particular automobile is listed under the living expenses?

A. That automobile was an automobile purchased by the Doctor in the fall of 1947 and it was stolen, and the Doctor, of course, had insurance and sued to get recovery from the insurance company; *so there was no loss to be allowed on that until there was a final settlement by the insurance company.* That is an income tax regulation that if you have a claim you have no loss until the claim has been settled.

Mr. Parker: I move to strike that statement. The witness is not giving us a lecture on the law of income tax. I have no objection if he states what he did in connection with this, but we disagree with him most stringently on the point.

The Court: When the witness refers to the law, we will instruct the jury that the witness means his version of the law *as a tax expert* and his understanding of the regulations. That is what we will understand, Mr. Parker, just as when your expert takes the stand. We will have the same understanding." (Emphasis supplied.) (196-197).

Contrast the foregoing with the statement of the public accountant who testified at the instance of the defendant:

"Q. Secondly I would like to know whether or not it is in accord with sound tax accounting practice to charge off a stolen car where the insurance company has refused to pay or denied liability——

Mr. Royston: I object to that as this man's conclusion on a matter of law.

The Court: May I have the question, please?

Mr. Parker: I hadn't finished the question.

Mr. Royston: Excuse me. I withdraw my objection.

Q. (By Mr. Parker): And then upon recovery to report the net recovery as income and pay tax on it?

Mr. Royston: Then I make the objection as stated before.

The Court: Objection sustained as to that.

Q. (By Mr. Parker): I will put this question to you, Mr. Moser: In the course of your audit did you find that Dr. Lutfy did recover a judgment against the insurance company arising out of the theft of that Lincoln Continental automobile?

A. I did.

Q. And did you find in the course of your audit that upon recovering that judgment for the theft of that automobile reported it as income at a later——

Mr. Roylston: I object——maybe I interrupted too soon again.

Q. (Continuing): ——on a tax return for the year on which he made the recovery?

Mr. Roylston: I object unless the year is given. If they give the year then I have no objection.

Mr. Parker: I am not absolute as to the year. What year was it that he reported——

A. The year 1950.

Mr. Parker: Does that satisfy your objection?

Mr. Roylston: Yes, sir.

Q. (By Mr. Parker): Did he report it as income and pay tax on the recovery for that stolen automobile in the year 1950?

A. He did.

Q. Is there anything unusual from an accounting point of view about his charging off when stolen and reporting it back as income when he recovered on it? Is that objectionable to you?

Mr. Roylston: I object to that on the ground it is calling for a conclusion of this witness.

Mr. Parker: I submit the witness is an expert.

The Court: He may answer that.

Q. (By Mr. Parker): Is there anything unusual about that?

A. Under the particular circumstances, no." (355-357)

As to the damage obviously created by the opinions broadcast by this revenue agent, we call the attention of the Court to his description of defendant's *unreported income* (200-201) which he later admits is really a question of what deductions are allowed or disallowed:

"Q. The fact is, Mr. Whitsett, that what you mean by unreported net income is simply this: that the taxpayer arrived at one conclusion after making the deductions claimed by him as to his net income, and

you after exercising your judgment as to what deductions were proper arrived at another figure?

A. That is right.

Q. That is what it amounts to, isn't it?

A. That is right." (219)

There were two real estate transactions involving purchase and sale at a profit of real estate owned by or in which the defendant had some interest, both of which the revenue agent treated as short-term gains and fully taxable in the making of his computations, whereas, the evidence as to the first of such transactions shows that the property was purchased and escrow papers signed and a deposit on the purchase money made April 4, 1945. The new purchasers, which included the defendant, took over the property and received the rents and profits therefrom from June 15, 1945. However, one of the sellers was a minor child who did not attain age 21 until July 26, 1945 and who thereafter executed a deed on August 10, 1945. The sale of this property was signed by the buyer on January 18, 1946 and by the last of the sellers on January 21, 1946. All of these facts are set forth in detail in Government's Exhibits 24 and 25 and pages 222-229 and at page 264 of the printed Transcript of Record.

As to the second such transaction the facts are set forth in Government's Exhibits Nos. 20 and 23 and Transcript of the Record, pages 228-231, 264.

In contrast to the revenue agent's treatment of these transactions, the attention of the Court is directed to testimony of the defense witness Moser where both the transactions are confidently treated as long term capital gains (346-347).

CONCLUSION

Counsel for defendant readily confesses to the Court that had the net worth decisions of the Supreme Court of December 6, 1954, been available at the time of the trial of this case, a considerably different record might have been made with respect to the proper preservation of objections and making of proper motions patterned to the rules laid down, particularly in the *Holland*, *Smith* and *Calderon* cases. However, the rules and standards established by the Supreme Court in those cases are no less applicable to this case, notwithstanding that neither the Court nor counsel had the advantage of those decisions at the time of the trial of the case and the institution of the appeal.

On behalf of defendant we respectfully urge to this Court that the Government's net worth proof was faulty in the extreme, and even if taken at face value was fully explained and reconciled with the revenue laws and regulations and established tax accounting practices in the testimony of the Certified Public Accountant, R. Dale Moser (325-441).

It may be argued by counsel for the Government that, ignoring all of the evidence relating to net worth, there still remained in the record sufficient evidence to go to the jury on the question of attempt to evade the payment of income taxes. As to this contention two things are present. One, the net worth evidence having been submitted and computation sheets having been placed in the hands of the jurors, there is no possible way of determining the impact of that evidence and the influence of it on the minds of the jurors with respect to other or so-called independent evidence upon which the verdict might have been predicated and; two, the evidence concerning improper computation by the defendant of depreciation allowances, even though reconciled by showing that the defendant might have con-

sistently with law taken even greater depreciation reserves than he did take, runs into the question of whether or not such evidence was outside the scope of the Government's bill of particulars and amendments thereto. It seems reasonable to say that the evidence on depreciation was by far the strongest evidence offered by the Government outside of the net worth evidence. We respectfully submit that this evidence went beyond the scope of the bill of particulars, and the objections to it and motions to strike it should have been ruled upon favorably to the defendant.

Counsel for the defendant having from past experience been accustomed in criminal cases of such importance to the limiting of witnesses to factual matters, was amazed and not a little stunned when the Government revenue agent, by the nature of whose work is a more or less professional witness, is permitted to freely broadcast opinions in the course of his testimony and to make statements of a derogatory character respecting a person on trial. The ordinary citizen stands a bit in awe of Government officials, including laymen who serve on juries, and the damage which can be quietly and cleverly done to the rights of the accused by a smooth speaking Government witness is incalculable. For that reason and the other reasons set forth in this brief, counsel sincerely urges this Court to reverse the conviction of the defendant in the court below and to direct that a new trial be granted.

Respectfully submitted.

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No. 14,630

In the
United States Court of Appeals
For the Ninth Circuit

LOUIS P. LUTFY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Reply Brief

Upon Appeal from the United States District Court for the District of Arizona

FILED

JUL 26 1955

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SUBJECT INDEX

	Page
Introductory Statement.....	1
Argument	2
I. Net Worth Proof.....	2
II. Variance from Bill of Particulars.....	7
III. Prejudicial Testimony of Government Witnesses Herre, Fairfield and Whitsett.....	10
Conclusion	12

TABLE OF CASES

	Page
Berger v. U. S., 295 U.S. 78.....	8
Bryan v. U. S. (CCA 5th) 175 F.2d 223.....	9
Goldbaum v. U. S. (CCA 9th) 204 F.2d 74.....	8
Holland v. U. S., 99 L. Ed. 127.....	12
Smiley v. U. S. (CCA 9th) 186 F.2d 903.....	9

In the

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Appellant's Reply Brief

Upon Appeal from the United States District Court for the District of Arizona

Introductory Statement.

Counsel for the Government in the Brief for Appellee have devoted the major portion of said brief to an appendix beginning on page 16 thereof and ending on page 39, containing a transcript of the court's instructions to the jury. Bearing in mind that the appellant has not taken exception to the court's instructions and has predicated no contention of error and no argument upon any portion of these instructions, it does not appear that they are relevant. As pointed out on page 14 of appellee's brief, the theory upon which

the court's instructions to the jury were included in the form of an appendix to the brief is that since the instructions of the court were fair to the appellant, it must necessarily follow that appellant was accorded a fair and impartial trial. The lack of logic in this deduction is fully answered in the Brief for Appellant (26-42). The conduct of the trial and the instructions to the jury are separate functions of the court, and it is patent that one or the other of these functions may be performed by the court to perfection while the other may be replete with imperfections. The absence of criticism of the court's instructions to the jury on the part of appellant makes the appendix mere surplusage and does not necessarily establish that defendant was in all particulars afforded a fair and impartial trial according to law.

The body of appellee's brief (4-14) contains a paucity of citations of authority aside from those discussed in the Brief for Appellant and is largely confined to a brief statement of certain facts and inferences which the Government contends are present in the record of the trial of the cause.

It does not appear to counsel for the appellant that the arguments advanced in appellant's brief have been squarely met or that any substantial authority has been advanced in answer to appellant's criticism of the conduct of the trial. These matters are hereinafer briefly adverted to.

ARGUMENT

I. Net Worth Proof.

(a) Appellee's answer to the contention, as shown by the proof, respecting a sum in excess of \$18,000.00 in cash which appellant admittedly had shortly prior to the beginning of the prosecution period, is to point out that accord-

ing to the Government's figures appellant had a net worth on December 31, 1945 of \$58,337.20, and that in 1944 and 1945 he had purchased six parcels of real estate upon which no *mortgages* were outstanding as of December 31, 1945, and the purchase price of which parcels of real estate was \$29,548.74. The Government assumes that this sum accounts for the more than \$18,000.00 in cash which appellant previously had.

The foregoing is a sheer assumption and must be characterized as speculation, not proof. Moreover, the absence of *mortgages* does not necessarily establish that property has been paid for in full.

(b) With respect to the argument under (b) beginning on page 5 of the brief of appellee, the only comment that is appropriate is that it discloses the Government's theory that under the net worth method of procedure the burden of proof is shifted to the accused to prove his innocence. Thus is pointed up one of the dangers to the rights of the accused inherent in the net worth method of proof.

(c) Beginning at page 6 of the Brief for Appellee is a discussion of the books and records of appellant and the suggestion, drawn from the *Holland* case, that his books were a set of blinkers to deceive the Government. Yet, as pointed out on page 22 of the Brief for Appellant, it was the Government's evidence that established the accuracy and completeness of appellant's books and records (98, 100, 111, 113, 115, 126). At the top of page 7 of appellee's brief, notwithstanding its own evidence to the contrary, it undertakes, by selecting out of context one question and answer during cross-examination of appellant's witness Moser, to establish that appellant's records did not reflect his true income. This same witness testified that appellant's books

and records were of average quality for accuracy and completeness (336, 337). Admittedly there were, of course, a small number of errors. Out of 3891 cash transactions during the year 1948 there were 14 instances in which the transactions, although recorded on the cards of appellant's patients, were not recorded in the log book kept by appellant, the same being typical of the margin of error to be expected in the most carefully kept books of any business or profession (434).

(d) Appellant must take issue with appellee's statements about the evidence contained on pages 7 and 8 of the Brief for Appellee, and particularly the following statement:

"The Appellant had previously told Internal Revenue Agents that he had received no loans other than the loan from Northwest Mutual Life Insurance Company (241)."

An examination of the transcript at this point discloses that the conversation, as related by Government witness Whitsett, was that pertaining to loans or gifts from members of appellant's wife's family and particularly Mrs. Linsenmeyer, and the particular question and answer was as follows:

"Q. This is the first you have heard? Then I take it you did not make any such allowance. Now, did you make any allowance in the computation of either Exhibits 33 or 34 of a loan made to Dr. Lutfy in the general vicinity of September 18, 1947, by Mrs. Linsenmeyer in the sum of either \$3200 or \$3500, and which has never been repaid?

A. No, because I asked the doctor if there were any other loans and he said that was all."

Appellant must also take issue with the following statement beginning at the bottom of page 7 of appellee's brief:

“Mrs. Lutfy stated that there were no loans obtained against these policies nor were any policies surrendered (309, 310).”

The exact language is as follows (Cross-examination of Bertha A. Lutfy by Assistant United States Attorney):

“Q. I believe you were questioned whether your husband had any life insurance policies prior to 1945?

A. Yes.

Q. To your knowledge were these policies ever cashed or did he make any loans from the company?

A. He made loans on them, yes.

Q. This loan you were talking about—

A. All I can say, he borrowed from life insurance companies.

Q. Is that approximately twelve or fifteen thousand dollars loan, is that the one you are talking about now?

A. That is from an insurance company.

Q. Prior to 1945 do you recall whether he received any specific amounts from loans from insurance companies or from surrendering any of those policies?

A. I don't believe so.

Q. With the exception of that, I have forgotten if it is twelve or fourteen or fifteen thousand dollar loan, with the exception of that, do you recall any other loans he made from life insurance companies?

A. During that year, I don't believe so.

Q. Now, as far as you know, did he cash any of these life insurance policies in, surrender them, during this period, '46, '47, and '48?

A. I don't think so. I am not sure.”

It is submitted that the foregoing evidence, when examined verbatim, does not contain all of the elements claimed for it by appellee.

(e) Counsel for appellee at least tacitly concedes that

the Government did not in fact rely upon the net worth evidence for conviction in this case:

“It should be pointed out that while the Government proceeded under the net worth theory in the present case, it also relied upon specific items. Some of these were excess evaluation of real estate for depreciation purposes, claiming personal expenditures as business expenses, claiming business expenditures as business expenses and capitalizing the same for depreciation thereby gaining a double deduction, and treating short-term capital gains as long-term. . . . By proving these specific items, the Government did not entirely rely upon the evidence of net worth increases and expenditures in excess of reported income, but adduced substantial independent evidence of the crime of income tax evasion.” (Appellee’s brief 8, 9.)

The foregoing statement points up as nothing else could the vice of the net worth evidence in this case. Actually, it was not a case in which the Government needed to resort to the net worth method. Counsel for the Government in the foregoing statement appears to tacitly concede that the conviction of this appellant was predicated upon specific items. Yet in such a case the great mass of evidence admitted under the net worth theory has an inescapable tendency to so prejudice the jury, or to confuse its members, as to preclude a successful defense by the accused, however innocent, and this appears to be one facet of the dangers which Mr. Justice Clark so aptly expressed with respect to the net worth method in the *Holland* case (Brief for Appellant 16, 17, 18, 19).

Also, the foregoing statement of counsel for appellee presents an opportune occasion to compare the specific items upon which it is suggested this conviction rests with the

text of the Government's reply to defendant's motion for further particulars (T. R. 20-22).

II. Variance from Bill of Particulars.

Counsel for appellant has contended and persists in the contention, as set forth in Brief for Appellant (24-25), that the evidence admitted over objection concerning the computation of depreciation on capital assets during the prosecution period, evidence respecting business expenditures as business expenses, and evidence seeking to treat as ordinary income certain capital gains attributed to appellant, were entirely outside the scope of the Government's bill of particulars and any and all amendments thereto (R. T. 11-14, 16, 20-22), and should have been excluded.

Nothing in the Government's specifications indicated that the Government intended to show that depreciation reserves were improperly computed. While it is true that appellant might have continued filing motions for bills of particulars and further particulars, there was no way that appellant could know what was in the minds of Government attorneys, and therefore, upon being furnished with certain specifications would naturally conclude that such specifications were complete. It is conceded that the Government's particulars were confusing but principally for the reason that the Government constantly shifted its position and its theory of the case. Otherwise, appellant could certainly assume with confidence that the Government had set forth specifically and with clarity the field of intended proof. The Government had been given at least three opportunities to do so, and when, for the first time on the trial of the case, it was found that the Government's attorneys had other intentions in mind, appellant was completely taken by surprise and

compelled to defend as best he might on the spur of the moment.

The case of *Berger v. U. S.*, 295 U.S. 78 (Brief of Appellee page 11), involves mainly a situation where an indictment charged a conspiracy against several persons and the proof went only to some but not all of the persons named. The decision of the Court holding that there was no fatal variance between the proof and the charge did not deal specifically with a bill of particulars. In discussing the question of variance between indictment and proof, the Court said:

“The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected from another prosecution for the same offense.”

In *Goldbaum v. U. S.* (C.C.A. 9th), 204 F.2d 74 (Brief of Appellee 11), the bill of particulars said merely:

“The gross receipts figure of \$3,685,469.75 for 1949 alleged in count thirteen of the indictment was derived from the books and records of the Golden News Service (Flamingo Commissioners)”.

This Court at page 78, referring to the bill of particulars, said:

“Actually it is apparent that it says practically nothing except that the figure referred to was derived from the books and records of the Golden News Service * * *. We think it did not in fact limit the character of the admissible proof under the original count.”

Thus, it is apparent that the above case is not helpful in the case at bar and provides no solution to the problem arising where the Government seeks to go outside of the bill of particulars after having furnished what appeared to be a specific bill.

The case of *Smiley v. U. S.* (C.C.A. 9th), 186 F.2d 903 (Brief for Appellee 11), does not involve a bill of particulars at all. Appellant was charged with fraudulently representing himself as a citizen of the United States to a Deputy Sheriff of Los Angeles County, one Sui, whereas, the proof showed that while Sui was present most of the time while appellant was being booked by the deputies, the representation of citizenship was actually made to Deputy Hopkins. This Court held that such proof did not create a fatal variance, and at page 905 said :

“* * * The evidence at the trial was in part documentary. It is of such character as to firmly peg the crime charged to the circumstances of time and place and persons present in such a manner as to fully protect appellant against another prosecution for the same offense. He would have no difficulty were another prosecution attempted in showing former jeopardy.”

In connection with the problem here under discussion, the case of *Bryan v. U. S.* (C.C.A. 5th), 175 F.2d 223 (Brief of Appellee 12), has some relevancy. This case involved the same charge as in the case at bar, and the holding of the court, generally stated, is that mere proof of expenditures in excess of reported gross income during the prosecution years is not sufficient to sustain a conviction. The court also held that the proof is limited to the scope of the bill of particulars, saying at page 224:

“Two bills of particulars filed by the United States Attorney limit the alleged evasions to understatements

of the gross receipts derived from the business operated by appellant in each of the years. No claim is made that the deductions from the income tax returns of the appellant were unallowable, fictitious, or false. Measured, as the proof must be, by these bills of particulars, the conviction must stand or fall upon the proof, or lack of proof, of false statements knowingly made for the purpose of evading income taxes in the returns of gross business receipts for the years in question."

Therefore, notwithstanding appellee's argument to the contrary, appellant contends that reversible error was committed by the district court in overruling timely objections to evidence manifestly outside of the specifications of the bill of particulars, and that under the bill of particulars as filed the only deductions subject to challenge were "all non-deductible personal expenses taken as business deductions * * *"

III. Prejudicial Testimony of Government Witnesses Herre, Fairfield and Whitsett.

With respect to the witness Herre, appellee argues (Brief for Appellee 13) that the court sustained the defendant's objections to this hearsay testimony and instructed the jury to disregard the answer of the witness. However, in this connection reference to Brief for Appellant (27-31) and Transcript of Record (71-77) shows clearly that as must surely have been known to the attorneys for the Government, this witness was incapable of testifying to any relevant fact in the case. The whole of his testimony was by the most elementary rules of evidence incompetent and improper. Notwithstanding this fact, he was put forward as a Government witness under circumstances where neither the court nor appellant's counsel would suspect

that his testimony was wholly incompetent. Thus, notwithstanding frequent objections from appellant's counsel, he testified at some length before his sojourn on the witness stand was finally terminated. It would indeed be naive to assume that a mere instruction of the court to the jury to disregard one answer of the many answers he gave would be sufficient to eliminate the prejudice thereby created.

Counsel for the Government makes no answer at all to the discussion of the testimony of the Government's witness John L. Fairfield on page 31 of appellant's brief.

With respect to the witness Whitsett, attorneys for appellee contend that he was justified in his broadcast of personal opinions upon the ground that he was "an expert in his field", and as a further ground for his conduct says "His manner and demeanor were of course under the close scrutiny of the jury throughout his testimony" (Brief for Appellee 13).

The final reason offered by appellee in justification of the conduct of this Government witness-employee is the inclusion of the court's instructions to the jury. Counsel for appellee apparently feels that since the instructions to the jury given by the district judge were not challenged that the conduct of the witness Whitsett is thereby rendered of no consequence. With this conclusion counsel for appellant must take sharp issue. Reference is made to Appellant's Brief, pages 31-42, for examples of the manner in which this witness by every known subtlety at his command most obviously sought to prejudice the trial jury against the appellant. It is submitted that there was no way that appellant could protect himself in advance against the insinuations and opinions of this long-time Government employee, nor, in fact, could the court have effectively, by any instruction to the jury, obviated the result produced. Counsel for

appellee does not in the brief contend that the witness Whittsett did not infiltrate his answers with his own opinions or repeatedly suggest inferences adverse to the appellant, but merely seeks to excuse them as hereinabove set forth. The writer is of the belief that agents of the Internal Revenue Service are morally bound to refrain from such tactics. The ethics of the situation are plain. The impact upon the jury incalculable. If the plain unvarnished factual material of the case will not alone produce a conviction, no conviction should be had. As long as the courts permit convictions to stand which have plainly been influenced by such carefully prepared subtleties, Revenue agents who become witnesses in such cases will have no reason to discontinue the employment of personal opinion, insinuation, innuendo and such in phrasing their answers to questions which call only for facts.

This situation is further accentuated by the practice of turning the witness loose to deliver a carefully prepared discourse without interrogation. This practice is complained of in this appeal, but brought no response from the appellee (Brief for Appellant 37-38).

CONCLUSION

Appellant sincerely believes and therefore urges the court that the admonitory rules set forth in *Holland v. U. S.*, 99 L. Ed. 127, require the reversal of the conviction of this appellant.

Respectfully submitted.

PARKER & MUECKE

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No. 14638

United States
Court of Appeals
for the Ninth Circuit

OLE FAGERHAUGH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

MAR 21 1955

PAUL P. O'BRIEN, CLERK

No. 14638

**United States
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Certificate of Clerk to Record on Appeal	129
Indictment	3
Judgment and Commitment	30
Minute Order, July 26, 1954—Arraignment	5
Minute Order, December 27, 1954—Order Submitting and Granting Motion for Admission to Bail	132
Motion by Defendant to Dismiss the Indictment	6
Affidavit of Bertram Edises	8
Ex. A—House of Representatives Report Entitled "Proceedings Against Ole Fagerhaugh"	9
B—House Resolution 539, Adopted May 11, 1954	22
C—Portions of the Congressional Record for May 11, 1954	23
Motion to Strike	25
Notice of	25
Names and Addresses of Attorneys	1

INDEX	PAGE
Notice of Appeal	32
Order, Dated September 17, 1954	29
Statement of Points on Which Appellant Relies	133
Transcript of Proceedings	33
Opening Statement on Behalf of Defend- ant	34
Opening Statement on Behalf of Plaintiff	36
Witnesses, Defendant's:	
Kinsey, Charles W.	
—direct	96
Wheeler, William A.	
—direct	106
Witnesses, Plaintiff's:	
Kinsey, Charles W.	
—direct	94
—cross	95
Wheeler, William A.	
—direct	46
—cross	60
—redirect	93
—recross	93

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In the United States District Court for the Northern
District of California, Southern Division

No. 34153

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLE FAGERHAUGH,

Defendant.

(Violation: 2 U.S.C., 192)

Citation for Contempt of Congress.

INDICTMENT

The Grand Jury charges:

Introduction

On Friday, December 4, 1953, at San Francisco, California, within the Northern Judicial District of California, a duly created subcommittee of the Committee on Un-American Activities of the House of Representatives of the United States was conducting an inquiry pursuant to authority conferred upon it by law, and particularly Subsection (q)(2), Section 121 of Public Law 601 of the 79th Congress, and House Resolution 5 of the 83rd Congress. The defendant Ole Fagerhaugh appeared as a witness before that subcommittee at the place and on the date above stated, and was asked a question, which was pertinent to the question then under inquiry before the subcommittee. At the

time and place stated the defendant refused to answer this pertinent question. The allegations of this introduction are adopted and incorporated into the count of this indictment which follows, which count will in addition describe the question which was asked of the defendant and which he refused to answer.

First Count:

Where the defendant was then employed.

A True Bill:

/s/ [Indistinguishable].

Foreman.

/s/ LLOYD H. BURKE,

United States Attorney.

Approved as to Form:

/s/ A. C. N.

Penalty:

Fine of not more than \$1,000 nor less than \$100.00 and imprisonment in a common jail for not less than one month nor more than 12 months.
\$500.00

[Endorsed]: Filed July 15, 1954.

United States District Court for the Northern
District of California, Southern Division

At a stated term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Monday, the 26th day of July, in the year of our Lord one thousand nine hundred and fifty-four.

Present: The Honorable O. D. Hamlin,
District Judge.

This case came on this day *ex parte*. Richard C. Nelson, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendant, Ole Fagerhaugh, was present with his attorney, Bertram Edises, Esq.

Defendant was arraigned upon the indictment filed herein against him, stated his true name to be as contained therein, Mr. Edises waived the reading of the indictment and received a copy of indictment.

Motion of defendant for permission to leave jurisdiction of this Court was ordered granted, in accordance with an order this day signed and filed.

Ordered case continued to August 17, 1954, for entry of defendant's plea to indictment.

[Title of District Court and Cause.]

MOTION BY DEFENDANT TO DISMISS
THE INDICTMENT

The defendant moves that the indictment be dismissed on the following grounds:

1. The defendant validly asserted the privilege against self-incrimination under the Fifth Amendment.

2. The question was not propounded in good faith for the purpose of eliciting information needed by the subcommittee for any valid legislative purpose.

3. The defendant was not directed to answer following his assertion of the privilege.

4. The defendant was denied opportunity to state fully his reasons for declining to answer.

5. The contempt citation was voted by the House of Representatives upon an incomplete record because of the action of the chairman of the subcommittee in arbitrarily striking physically from the record portions of the defendant's answer to the question regarding his place of employment.

6. The refusal to answer was not wilful, but was made in good faith upon the advice of counsel.

7. The indictment does not state facts sufficient to constitute an offense against the United States, for the following reasons:

(A) Subsection (q) (2), Section 121 of Public Law 601 of the 79th Congress, and House Resolution 5 of the 83rd Congress, alleged in the indictment to constitute the authority pursuant to which the subcommittee was conducting its inquiry, is unconstitutional upon its face and as construed and applied by the committee.

(1) The resolution violates the First Amendment because it authorizes the censorship of ideas.

(2) The resolution is unconstitutionally vague and indefinite and is lacking in adequate standards for the guidance of the inquiry.

(B) The question asked of the defendant was not pertinent to the subject then under inquiry before the subcommittee, or to any lawful subject of inquiry by the subcommittee.

(C) The question constituted an unwarranted intrusion into the defendant's private and personal affairs.

This motion to dismiss the indictment is based upon all of the papers and pleadings herein, upon the accompanying memorandum of points and authorities, and upon the affidavit of Bertram Edises submitted herewith.

EDISES, TREUHART, GROSS-
MAN AND GROGAN,

By /s/ BERTRAM EDISES,
Attorneys for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT OF BERTRAM EDISES

State of California

County of Alameda—ss.

Bertram Edises, being first duly sworn, deposes and says:

That he is a member of the bar of this Court and of the State of California and of the United States Supreme Court, and is one of the attorneys for the defendant herein; that annexed hereto, marked Exhibit A, and hereby made a part hereof, is a full, true and exact copy of House Report No. 1584, entitled the "Proceedings Against Ole Fagerhaugh," which was submitted to the House of Representatives on May 11, 1954, and which resulted in the citation of defendant for contempt of Congress, as charged in the indictment.

That annexed hereto, marked Exhibit B, and hereby made a part hereof, is a full, true and exact copy of House Resolution 539, adopted by the House of Representatives on May 11, 1954, certifying the foregoing report to the United States Attorney for the Northern District of California, for the purpose of instituting legal proceedings against the defendant.

That annexed hereto, marked Exhibit C, and hereby made a part hereof, is a full, true and exact copy of the portions of the Congressional Record for May 11, 1954, pages 6030 and 6031,

which contain additional references to the citation of defendant.

Further affiant sayeth not.

/s/ BERTRAM EDISES.

Subscribed and sworn to before me this 16th day of August, 1954.

/s/ EDWARD R. GROGAN,
Notary Public in and for the County of Alameda,
State of California.

EXHIBIT A

House of Representatives

83d Congress 2d Session
Report No. 1584

Proceedings Against Ole Fagerhaugh

May 11, 1954—Ordered to be printed

Mr. Velde, of Illinois, from the Committee on Un-American Activities, submitted the following

Report

Citing Ole Fagerhaugh

The Committee on Un-American Activities, as created and authorized by the House of Representatives through the enactment of Public Law

Exhibit A—(Continued)

601, section 121, subsection (q) (2) of the 79th Congress, and under House Resolution 5 of the 83d Congress, caused to be issued a subpoena to Ole Fagerhaugh, 2265 East 19th Street, Oakland, Calif. The said subpoena directed Ole Fagerhaugh to be and appear before said Committee on Un-American Activities on December 1, 1953, at the hour of 10 a.m., then and there to testify touching matters of inquiry committed to said committee, and not to depart without leave of said committee. The subpoena served upon said Ole Fagerhaugh is set forth in words and figures as follows:

By authority of the House of Representatives of the Congress of the United States of America, to William A. Wheeler and/or Chief of Police Lester J. Divine: You are hereby commanded to summon Ole Fagerhaugh, 2265 East Nineteenth Street, Oakland, Calif., business, Illinois Glass Co., 601 36th Avenue, Oakland, Calif, to be and appear before the Committee on Un-American Activities, or a duly authorized subcommittee thereof, of the House of Representatives of the United States, of which the Hon. Harold H. Velde is chairman, in their chamber in the city of San Francisco, Calif, on December 1, 1953, at the hour of 10:00 a.m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee.

Herein fail not, and make return of this summons.

Exhibit A—(Continued)

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 16th day of October, 1953.

HAROLD H. VELDE,
Chairman.

Attest:

LYLE O. SNADER,
Clerk.

The said subpoena was duly served as appears by the return made thereon by L. K. Holmes, 5270-E, Oakland Police Department, who was duly authorized to serve the said subpoena. The return of the service by the said L. K. Holmes, being endorsed thereon, is set forth in words and figures, as follows:

Subpena for Ole Fagerhaugh, before the Committee on Un-American Activities, on December 1, 1953. Served 28 Oct. 53—0950. L. K. Holmes, 5270-E, O. P. D.

On November 20, 1953, a telegram was sent to Ole Fagerhaugh by Hon. Harold H. Velde, chairman of the Committee on Un-American Activities, which is set forth in words and figures as follows:

MIN NL GOVT

CHG B25.

Night Letter

November 20, 1953.

Upon continuing authority of the subpoena served upon you your appearance before the Committee on Un-American Activities is hereby postponed from December 1, 1953, to

Exhibit A—(Continued)

December 3, 1953, 9:30 a.m., Board of Supervisors Room, City Hall, Civic Center, San Francisco, California.

HAROLD H. VELDE,
Chairman.

On December 3, 1953, at the conclusion of the day's hearings, the chairman of the committee announced that all witnesses not heard on December 3 were to report in the hearing room promptly at 9:30 a.m., December 4, 1953.

The said Ole Fagerhaugh, pursuant to said subpoena and in compliance therewith, appeared before the said committee on December 4, 1953, to give such testimony as required under and by virtue of Public Law 601, section 121, subsection (q) (2) of the 79th Congress, and under House Resolution 5 of the 83d Congress. The said Ole Fagerhaugh, having appeared as a witness and having been asked the question, namely:

Where are you presently employed?

which question was pertinent to the subject under inquiry, refused to answer such question; and as a result of Ole Fagerhaugh's refusal to answer the aforesaid question, your committee was prevented from receiving testimony and information concerning a matter committed to said committee in accordance with the terms of the subpoena served upon the said Ole Fagerhaugh.

Exhibit A—(Continued)

The record of the proceedings before the committee on December 4, 1953, during which Ole Fagerhaugh refused to answer the aforesaid question pertinent to the subject under inquiry is set forth in fact as follows:

Friday, December 4, 1953

United States House of Representatives,
Subcommittee of the Committee on Un-American
Activities,

San Francisco, Calif.

Public Hearing

The subcommittee of the Committee on Un-American Activities met, pursuant to adjournment, at 9:30 a.m., in the hearing room of the board of supervisors, city hall, Hon. Harold H. Velde (chairman), presiding.

Committee members present: Representatives Harold H. Velde (chairman), Donald L. Jackson, Gordon H. Scherer, and Clyde Doyle.

* * *

Mr. Velde: Let the record show that for the purposes of this hearing I have set up a subcommittee consisting of Mr. Donald Jackson, Mr. Gordon Scherer, Mr. Clyde Doyle, and myself, as chairman, for the purpose of this hearing.

* * *

Mr. Kunzig: Mr. Fagerhaugh now has arrived.

Exhibit A—(Continued)

Mr. Velde: In the testimony you are about to give before this subcommittee, do you solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Fagerhaugh: I do.

Testimony of Ole Fagerhaugh, Accompanied by
His Counsel, Robert E. Treuhaft

Mr. Kunzig: What is your present employment, sir?

Mr. Fagerhaugh: I am a warehouseman.

Mr. Kunzig: Where are you employed?

* * *

Mr. Velde: Will you answer the question, please? What is your employment?

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

* * *

Mr. Velde: Now will you answer the question, Mr. Witness, or give your legal basis for refusing to answer the question?

Mr. Fagerhaugh: Well, I am trying to give my reasons, including my legal reasons for refusing to answer this question, and I would like to proceed to do that if the committee will permit.

Mr. Jackson: Your opinion of the committee is not a legal reason for refusing to answer the questions. As a matter of fact, the committee is not at all concerned with your opinion of it.

Exhibit A—(Continued)

Mr. Scherer: I am going to object to counsel in this case again telling the witness what to say.

Mr. Treuhaft: I am going to object to the committee making inferences that are unjustified.

Mr. Velde: The counsel should know his rights to confer with his witness. This is not a court of law as counsel well knows.

Mr. Treuhaft: I am aware of that.

Mr. Velde: This is a committee of Congress trying to ascertain the true facts about subversion in this country, and I ask that the counsel for the witness please remember that fact and act in accordance with the rules of the committee.

Will the witness answer the question?

Mr. Fagerhaugh: Will you repeat the question, please?

Mr. Kunzig: I believe if I recall correctly that the question was, where are you presently employed?

Mr. Fagerhaugh: I am going to continue to stand on my right not to answer that question because, as I say, the committee is already fully aware of where I am employed, and I don't see any purpose——

Mr. Scherer: Frankly I don't know where you are employed; I have no idea where you are employed, and the record should show where you are employed. It is not on the record, Mr. Chairman.

Mr. Velde: Frankly, I don't know, either, and I don't know whether any member of the committee knows.

Exhibit A—(Continued)

Mr. Fagerhaugh: I would rather the committee enter that fact into the record from their own records. I am not going to be a party to dragging my employer into this smear campaign.

Mr. Jackson: Does the committee know where the witness is employed?

Mr. Kunzig: Yes, sir. May I answer that in one minute? I should like first to request that the witness be directed to answer that question, and then I will ask another one about the address.

Mr. Velde: Certainly, the witness is directed to answer the question. Where are you employed?

(At this point, Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Fagerhaugh: I am going to decline to answer that question on the grounds of my rights under the fifth amendment.

Mr. Kunzig: Let me put it this way, Mr. Fagerhaugh: Are you employed at the Illinois Glass Co., 601 36th Avenue, Oakland, so that the record will state correctly?

Mr. Fagerhaugh: Same answer.

Mr. Kunzig: You feel that to answer "Yes" or "No" to that question would incriminate you?

Mr. Fagerhaugh: I don't feel that that answer or any answer I might give here might incriminate me. I have committed no crime. I am guilty of no crime, and I have nothing to fear. Now, my rights under the Constitution state that I may decline to answer this question on the grounds that I am guar-

Exhibit A—(Continued)

anted the right not to act as a witness against myself, and for further reasons——

Mr. Velde: In a criminal proceeding; is that not true? And you say you have committed no crime whatsoever. Then do you still feel that you are entitled to the protection of the fifth amendment, when you have committed no crime?

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Fagerhaugh: I want to make very clear my position on this because what is said here today may some day be used in a court of law, and so I want it clearly understood the reason—my reasons for claiming the right not to answer this question under the fifth amendment, and I would like to——

Mr. Velde: Proceed, Mr. Counsel.

Mr. Kunzig: Mr. Chairman, the witness has refused to answer on the grounds of the fifth amendment and has said under oath he has not committed any crime. I should like therefore to ask him this question, whether you have ever been a——

Mr. Treuhaft: Just a moment, counsel. The answer has not been finished and you have interfered and interrupted.

Mr. Velde: Counsel knows his right to advise with his client; it is limited to that.

Mr. Treuhaft: I want to consult with my client.

(At this point, Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Exhibit A—(Continued)

Mr. Velde: Give the counsel an opportunity to talk with the witness.

Mr. Kunzig: Mr. Chairman, may I continue with the questioning?

Mr. Fagerhaugh: I would like to continue——

Mr. Kunzig: There is no question before the witness.

Mr. Velde: There is no question before the witness.

Mr. Fagerhaugh: I have not finished answering my reasons.

Mr. Velde: You have been given permission and opportunity to confer with your counsel. No question is pending.

Mr. Fagerhaugh: I still didn't finish the question that was asked.

Mr. Kunzig: For the record, to make it clear, the previous question the witness declined to answer on the grounds of the fifth amendment. Now I ask this question, Mr. Fagerhaugh: Have you ever been a member of the Communist Party——

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Kunzig (Continuing): Political Affairs Committee of Alameda County?

Mr. Fagerhaugh: I am not going to answer any further questions until I have been given an opportunity for the record to give a complete answer to the last question that was asked of me.

Mr. Velde: Well, will you give a complete an-

Exhibit A—(Continued)

swer, or will you refuse to answer as you have done before?

Mr. Fagerhaugh: I want to give my reasons for declining to answer.

Mr. Velde: You may give your reasons, your explanation, if you will answer the question, but certainly not if you refuse to answer the question.

Mr. Fagerhaugh: I think it should be made very clear my reasons for refusing to answer this question because the committee seems to raise the question, well what have I to fear to answer a question like where do I work. Well, for the sake of the record, I want my reasons, I want to give my reasons for declining to answer under the fifth amendment because this case may come into a court of law, and I want it clearly understood what my reasons are. Now, I would like——

Mr. Velde: You say you have committed no crime. Then how can you sit there and claim the privileges against self-incrimination?

Mr. Fagerhaugh: Because the fifth amendment was drawn up to protect the innocent as well as the guilty, as you well know, and Chief Justice Rutledge has said, and if I may quote him——

Mr. Velde: The committee is well aware of the——

Mr. Fagerhaugh: I am not so certain the committee is well aware, and for the record, I would like to give a brief quote.

Mr. Jackson: In regular order, Mr. Chairman,

Exhibit A—(Continued)

let us have the questions and get the declinations or the answers.

Mr. Velde: If the witness continues to make voluntary statements not in answer to the question that counsel asks and the members of this committee ask, I assure you that you will be removed from the hearing room.

Proceed, Mr. Counsel.

Mr. Kunzig: The question now before the witness which he has been evading, Mr. Chairman, is: Have you ever been a member of the Political Affairs Committee of the Communist Party of Alameda County, a very simple question to answer.

(At this point, Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Fagerhaugh: Pardon me, what was the question?

(Representative Donald L. Jackson left the hearing room at this point.)

Mr. Kunzig: Well, I just wonder how you can confer all that time without knowing the question, but I will repeat it for about the fourth time, Mr. Witness. Have you ever been a member of the Political Affairs Committee of the Communist Party of Alameda County, as was testified here yesterday by Mr. Blodgett?

Mr. Fagerhaugh: I decline to answer that question on the grounds of the fifth amendment.

Exhibit A—(Continued)

Mr. Kunzig: Have you ever been a member of the Communist Party at any time whatsoever?

Mr. Fagerhaugh: I likewise decline to answer that question on the grounds of my rights under the fifth amendment.

Mr. Kunzig: Are you now a member of the Communist Party?

Mr. Fagerhaugh: I further decline to answer that question on the grounds of the fifth amendment.

Mr. Kunzig: No further questions, Mr. Chairman.

* * *

Mr. Velde: * * * Is there any reason why this witness should be further retained under subpoena?

Mr. Kunzig: No, sir.

Mr. Velde: The witness is dismissed, and the committee will be in recess for 10 minutes.

Because of the foregoing, the said Committee on Un-American Activities was deprived of answer to pertinent question propounded to said Ole Fagerhaugh relative to the subject matter which, under Public Law 601, section 121, subsection (q) (2) of the 79th Congress, and under House Resolution 5 of the 83d Congress, the same committee was instructed to investigate, and the refusal of the witness to answer the question, namely:

Where are you presently employed?

which question was pertinent to the subject under inquiry, is a violation of the subpoena under which the witness had previously appeared, and his re-

Exhibit A—(Continued)

fusal to answer the aforesaid question deprived your committee of necessary and pertinent testimony, and places the said witness in contempt of the House of Representatives of the United States.

EXHIBIT B

H. Res. 539

In the House of Representatives, U. S.,

May 11, 1954.

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives as to the refusal of Ole Fagerhaugh to answer a question before the said Committee on Un-American Activities, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States Attorney for the Northern District of California, to the end that the said Ole Fagerhaugh may be proceeded against in the manner and form provided by law.

Attest:

Clerk.

EXHIBIT C

“Mr. Jackson * * *

“Ole Fagerhaugh was heard by a sub-committee in San Francisco and is the only one of the nine presently being considered who was not heard here in Washington.

“Mr. Fagerhaugh refused to answer any questions concerning his alleged Communist Party membership and activities, and refused specifically to answer the question, ‘Where are you employed?’ He stood on the fifth amendment in each instance. The committee felt that saying that he was employed at the Illinois Glass Co., Oakland, Calif., could not possibly incriminate him and, therefore, that he used the fifth amendment improperly. It was further considered by the committee that as a matter of proper identification of Mr. Fagerhaugh his place of employment was necessary and desirable.

“Mr. Keating: Mr. Speaker, will the gentleman yield?

“Mr. Jackson: I yield to the gentleman from New York.

“Mr. Keating: Is the only basis for the citation against Fagerhaugh his failure to answer the question as to where he was employed?

“Mr. Jackson: I believe that is the specific question which the committee considered to represent a misuse of the constitutional provision. * * *

* * *

“Mr. Keating: Referring again to Fagerhaugh who refused to answer the question: ‘Where are you presently employed?’ Would the gentleman just enlighten us a little further on the reason why the committee felt that that question was pertinent to the subject under inquiry?

“Mr. Jackson: Yes, there were two principal reasons why the committee felt that the matter of his place of employment was important. First of all, as a matter of proper identification. Secondly, one of the principal goals of the Communist Party, as has been developed in testimony, has been to place Communist Party members in certain areas of employment. We know, for instance, that during the war an effort was made in the Baltimore area to place white collar workers in heavy industry. That has been developed throughout the country, and in order to determine that pattern, if it exists, the committee has made a very strong effort to determine the place of employment of one who has been identified under oath as a member of the Communist Party.

“Mr. Keating: I think that is helpful and it is convincing as to why that is a pertinent question.

“Mr. Jackson: I thank the gentleman.”

(Source: Congressional Record — House — May 11, 1954, pp. 6030, 6031.)

[Endorsed]: Filed August 17, 1954.

[Title of District Court and Cause.]

MOTION TO STRIKE

The United States of America moves this Honorable Court to strike the following exhibits filed herein in support of the Motion of the Defendant to Dismiss the Indictment:

Affidavit of Bertram Edises

Exhibit "A,"

Exhibit "B," and

Exhibit "C," all attached to said affidavit.

The ground for this Motion to Strike is that the documents referred to are not appropriate to be considered in connection with pre-trial motions under Rule 12(b) of the Rules of Criminal Procedure and are not a part of the record.

LLOYD H. BURKE,

United States Attorney,

By /s/ RICHARD C. NELSON,

Assistant. U. S. Attorney.

NOTICE OF MOTION TO STRIKE

To the Defendant Ole Fagerhaugh and to His Attorneys, Messrs. Edises, Treuhaft, Grossman & Grogan, 1440 Broadway, Oakland 12, California:

Please Take Notice that, in accordance with the foregoing Motion to Strike, the United States will move the Court to strike the herein-described documents at the time of the hearing of Defendant's

Motion to Dismiss Indictment, at 9:30 a.m., September 14, 1954.

LLOYD H. BURKE,

United States Attorney,

By /s/ RICHARD C. NELSON,

Assistant U. S. Attorney.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE AND IN OPPOSITION TO MOTION TO DISMISS

The first six grounds listed as bases for dismissal of the indictment rest on factual allegations and evidentiary materials submitted by affidavit with the Motion to Dismiss. It is well settled that the Court may not go beyond the indictment itself in deciding a Motion to Dismiss, even if the extraneous matters are of the type which may be judicially noticed.

Local 36, Int. F. & A. W. v. United States,
177 F. 2d 320 (9th Cir. 1949), cert. den.
339 U.S. 947.

Clearly, if the allegations of the indictment are insufficient to charge a crime, the Government may not supplement the indictment by affidavits or evidence. Likewise, the documents submitted by the defendant are irrelevant to any question before the Court on a pretrial motion.

The records of congressional proceedings such as those filed herein as exhibits will not be judicially noticed prior to trial.

United States v. Emspak,
95 F. Supp. 1010, at 1012 (D.D.C. 1951)

In the above case, a Motion to Strike documents containing similar evidentiary materials attached to a Motion to Dismiss was granted by the District Court for the District of Columbia.

United States v. Emspak,
Cr. No. 1742-50, Jan. 19, 1951, aff'd 203 F.
2d 54 (D.C. Cir. 1952), cert. granted 346
U.S. 809.

The factual allegations in the indictment must be taken as true for the purposes of a Motion to Dismiss.

Pierce v. United States,
252 U.S. 239, 244 (1920)

United States v. Chrysler Corp. Parts Wholesalers,
180 F. 2d 557 (9th Cir. 1950)

For example, under ground 7(b) of his Motion, defendant alleges the question asked him was not pertinent. Pertinency is pleaded in the indictment and is admitted until placed in issue by a plea of "Not Guilty." Therefore that ground at this time is irrelevant as are grounds 1 through 6.

Grounds 7(a)(1) and (2) and 7(c) assert the indictment states no crime because the enabling statute and resolution are unconstitutional.

The validity of the House Committee on Un-American Activities has been the subject of exhaustive examination and certainly by now conclusive determination. It has been held not to

violate the first amendment, the fifth amendment, or any absolute right of privacy. "The committee was and is constitutionally created, * * * it functions under valid statute and resolution which have repeatedly and without exception been upheld as constitutional * * *'" (Lawson v. United States, *infra*.)
See:

United States v. Josephson,
165 F. 2d 82 (2d Cir. 1947), cert. den., 333
U.S. 838 (1948).

Barsky v. United States,
167 F. 2d 241 (C.A.D.C. 1947), cert. den.,
334 U.S. 843 (1948).

Eisler v. United States,
170 F. 2d 273 (C.A.D.C. 1948).

Dennis v. United States,
171 F. 2d 986 (C.A.D.C. 1948), aff'd, 339
U.S. 162 (1950).

Lawson v. United States and
Trumbo v. United States,
176 F. 2d 49 (D.C. Cir. 1949), cert. den.
339 U.S. 934 (1949).

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney;

By /s/ RICHARD C. NELSON,

Assistant U. S. Attorney.

Dated: September 7, 1954.

Affidavit of Mail attached.

[Endorsed]: Filed September 7, 1954.

[Title of District Court and Cause.]

ORDER

In ruling on defendant's motion to dismiss, I will treat the seventh ground assigned separately.

(1) Grounds one through six:

Whether the defendant validly asserted the privilege against self-incrimination depends upon the setting and the circumstances in which the questions are propounded. The question is, as against the background of the law a question of fact. *U. S. v. Pechart*, 103 F. Supp. 417 (N.D. Calif. 1952). I believe this question can be better resolved at the trial.

The other grounds raised likewise depend upon all the facts and should likewise be decided at the trial.

(2) Ground seven:

The indictment is sufficient to allege an offense against the United States. *Lawson v. U. S.*, 176 F. 2d 49 (D.C. Cir. 1949), cert. den. 339 U.S. 934 (1950), reh. den. 339 U.S. 972 (1950).

Good Cause Appearing Therefor, it is ordered that defendant's motion to dismiss based on ground seven be and hereby is denied

The ruling on defendant's motion to dismiss based on grounds one through six is deferred for determination at the trial of the general issue.

Under the above order the government's motion to strike is moot and will therefore be denied.

Dated: September 17th, 1954.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed September 17, 1954.

United States District Court for the Northern
District of California, Southern Division

No. 34153

UNITED STATES OF AMERICA,

vs.

OLE FAGERHAUGH.

JUDGMENT AND COMMITMENT

On this 10th day of December, 1954, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of violation of Title 2 U.S.C., Sec. 192—Citation for Contempt of Congress. Refusal to answer pertinent question under inquiry before the subcommittee of the Committee on Un-American Activities of the House of Representatives of the United States, as charged in the indictment (single count); and the Court having asked the

defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Month and pay a fine to the United States of America in the sum of One Hundred Dollars (\$100).

Ordered that defendant be granted a stay of execution of judgment until December 17, 1954, at 10 o'clock a.m.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ O. D. HAMLIN,

United States District Judge.

Examined by:

/s/ RICHARD C. NELSON,

Assistant U. S. Attorney.

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

[Endorsed]: Filed December 14, 1954.

Entered December 15, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

1. Name and address of appellant: Ole Fagerhaugh, 2265 East 19th Street, Oakland, California.

2. Name and address of appellant's attorney: Edises, Treuhaft, Grossman and Grogan, Bertram Edises, Edward R. Grogan, 1440 Broadway, Oakland 12, California.

3. Offense: Violation of 2 U.S.C. 192 (Contempt of Congress).

4. Statement of judgment and sentence:

On December 10, 1954, appellant was adjudged guilty and sentenced to imprisonment for one month and a fine of \$100.00. Execution of sentence was stayed until December 17, 1954, with defendant continued at liberty on bail of \$500.00.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: December 17, 1954.

/s/ OLE FAGERHAUGH,
Appellant.

EDISES, TREUHAFT,
GROSSMAN AND GROGAN.

By /s/ BERTRAM EDISES,
Attorneys for Appellant.

[Endorsed]: Filed December 17, 1954.

The United States District Court, Northern District
of California, Southern Division

No. 34,153

Before: Hon. Oliver D. Hamlin, Judge.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLE FAGERHAUGH,

Defendant.

REPORTER'S TRANSCRIPT

October 14, 1954

Appearances:

For the Government:

LLOYD H. BURKE, U. S. Attorney, By
RICHARD C. NELSON, ESQ.,
Assistant U. S. Attorney.

For the Defendant:

EDISES, TREUHAFT, GROSSMAN
and GROGAN, By
BERTRAM EDISES, ESQ., and
EDWARD R. GROGAN, ESQ.

The Clerk: United States versus Ole Fagerhaugh, for trial.

Will respective counsel please state their appearance for the record?

Mr. Nelson: Richard C. Nelson for the United States.

Mr. Edises: Bertram Edises and Edward R. Grogan for the defendant.

Mr. Nelson: May it please your Honor, I understand counsel for the defendant has an opening statement he wishes to make at this time.

Opening Statement on Behalf of the Defendant

Mr. Edises: May it please the Court, the defendant in this case is charged with an offense generally referred to as contempt of Congress arising out of his refusal, upon advise of counsel, to answer a question asked of him before a sub-committee of the House Committee on Un-American Activities last December in the city of San Francisco. That question was, "Where are you employed?"

I wish at this time formally to state that the defendant, Mr. Fagerhaugh, now wishes to answer the question. He is prepared, ready and willing to answer that question, either before this Court or before the sub-committee in any manner which may be appropriate. In other words, he now offers, through his counsel, to purge the alleged—to purge himself of the alleged contempt. [2*]

Mr. Nelson: May it please the Court, in order that the record may be clear, I would like to state

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

the Government's opposition to this offer. We believe that the offer comes too late, and that only if the defendant had previously purged himself and done so before the committee which cited him for contempt could that be an appropriate presentation.

We further believe, your Honor, that it would be a very deleterious principle of law if the Congressional committees were required to obtain an answer to their questions at times and places convenient to the witnesses.

I understand your Honor desires to have authorities submitted on this point, and we will prepare a brief for your Honor on it.

The Court: Counsel has indicated in chambers prior to my coming on the bench that such an offer would be made, and has been informally discussed in chambers. Counsel on either side have been unable to offer any authorities to the Court at this time, either for or against the position taken by either counsel, and it is my feeling that this offer should be taken under advisement and that counsel should have an opportunity, upon either side, to present authorities to the Court as to whether such an offer is proper at this time in this form, so that offer will be taken under advisement and a convenient time will be allowed counsel to present authorities.

Mr. Edises: Could I simply supplement my statement to [3] this extent, your Honor, that I called Mr. Lloyd Burke, the United States Attorney in this district, on Monday, and made that offer to him. His reply at that time was inconclusive, but

tended to be negative. I gather that has now been confirmed by the United States Attorney.

I would also like the record to show that the same day I attempted to communicate by long distance telephone with Chairman Velde of the committee, both at his office in Washington and at his home in Pekin, Illinois, for the purpose of making the same offer to answer that question, but I was unable to reach the Congressman on any of those occasions.

Mr. Nelson: May the record reflect, your Honor, that the Monday to which counsel refers was Monday, October 11.

The Court: All right, proceed.

Opening Statement on Behalf of the Government

Mr. Nelson: May it please your Honor, the Government intends to prove in this case that a duly created and authorized sub-committee of the Committee on Un-American Activities of the United States House of Representatives held hearings in San Francisco, on Friday, December 4, 1953; that pursuant to the authority of that committee and of the House of Representatives, the defendant was summoned to appear, and did appear; that he was asked a question which was pertinent to the subject then under inquiry by that sub-committee, and that he refused to [4] answer that question, and that his refusal was willful, within the meaning of that term as the law has applied it to this type of case.

First of all, your Honor, does defendant wish to make an opening statement?

Mr. Edises: No.

Mr. Nelson: First of all, your Honor, the Government will offer certain documentary exhibits.

At this time, your Honor, the Government offers as Exhibit 1 a copy of the rules of the House of Representatives, which is certified by the Clerk thereof, drawing your attention to pages 24 and 25 which deal with the creation and powers of the Committee on Un-American Activities.

I would further state, your Honor, that this same material verbatim has been enacted into law of which your Honor could have taken judicial notice, Public Law 601 of the 79th Congress, which may be found at 60 Statute 828. I will ask that the exhibit be limited only to pages 24 and 25 as they deal with the Committee on Un-American Activities, and to the certification which appears on the last page.

The Court: You said Public Law 601 of the 79th Congress?

Mr. Nelson: That is correct, your Honor. If you wish the rest of that citation I can give it to you.

The Court: Section 121?

Mr. Nelson: Yes. [5]

The Court: All right, may be admitted and marked Government's Exhibit 1.

(Whereupon section of Rules of House of Representatives referred to above was received in evidence and marked Government's Exhibit No. 1.)

Mr. Nelson: The Government will now offer as Exhibit 2 in evidence a certification by the Clerk of the House of Representatives giving the name of the

Speaker of the House and of the Clerk of the House of the 83rd Congress. This merely is for the purpose, your Honor, of verifying further documents.

The Court: May be marked Exhibit 2.

(Whereupon resolution dated January 3, 1953, referred to above was received in evidence and marked Government's Exhibit No. 2.)

Mr. Nelson: The Government will offer as Exhibit 3, your Honor, a certified statement signed by the Clerk of the House of Representatives, giving the membership of the Committee on Un-American Activities, House of Representatives of this Congress, 83rd.

The Court: Exhibit 3.

(Whereupon certified statement referred to above was received in evidence and marked Government's Exhibit No. 3.)

Mr. Nelson: The Government will offer as Exhibit 4, your Honor, a certified copy of report No. 1584, which previously [6] may appear in your Honor's file as part of the affidavit of Mr. Edises in connection with pre-trial motion.

Mr. Edises: May it please the Court, in this connection I want the record to indicate a reservation on the part of the defendant as to whether or not the testimony which is set forth in this proffered exhibit—may I see it—is a full, true and accurate transcript of the proceedings which took place before the Un-American Activities Committee.

Mr. Nelson: We will stipulate, your Honor, it is

not a complete transcript. It is offered merely for the purpose of showing to your Honor that a report was made by the Chairman of the Committee to the House of Representatives showing, your Honor, what was in that report.

Mr. Edises: In other words, counsel, if I understand you correctly, you are offering this to show the record upon which the House of Representatives proceeded in citing Mr. Fagerhaugh, is that correct?

Mr. Nelson: That is not correct. I am offering it simply to show the existence of a report and that a report was made by the chairman to the House of Representatives. I don't make any pretension of saying that is the entire record upon which the contempt citation was voted.

The Court: May be marked Exhibit 4.

(Whereupon report No. 1584, referred to above, was received in evidence and marked Government's [7] Exhibit No. 4.)

Mr. Nelson: I offer to your Honor as Exhibit 5 the resolution of the House of Representatives dated May 11, 1954, directing the Speaker of the House of Representatives to certify the report to the United States Attorney, the report which your Honor has, the preceding exhibit.

The Court: Exhibit 5.

(Whereupon resolution of May 11, 1954, referred to above, was received in evidence and marked Government's Exhibit No. 5.)

Mr. Nelson: I will offer as Government's Ex-

hibit 6, your Honor, the certification by the Speaker of the House of Representatives to the United States Attorney for this district of the refusal of the defendant to answer a question.

The Court: Exhibit 6.

(Whereupon certification by the Speaker, referred to above, was received in evidence and marked Government's Exhibit No. 6.)

Mr. Nelson: I will offer at this time, your Honor, as Government's Exhibit next in order a certified copy of the transcript of the proceedings in the hearings of the sub-committee of the Committee on Un-American Activities held in San Francisco, on December 1, 1953. This is entitled "Part I," and it is offered, your Honor, merely for the statement of Chairman Velde contained on pages 3055 and 3056. [8]

The Court: Exhibit 7.

(Whereupon copy of transcript, "Part I," referred to above, was received in evidence and marked Government's Exhibit No. 7.)

Mr. Nelson: I will offer, your Honor, as Government's Exhibit next in order a certified copy of the transcript of the hearing held by the sub-committee of the Committee on Un-American Activities in San Francisco on December 4, 1953, which is marked "Part IV."

I offer that, your Honor, as the complete transcript of the testimony given by the defendant on

December 4, 1953, and I limit the exhibit to pages 3367 through 3371.

Mr. Edises: We would have an objection to the offer, your Honor, on the ground that there is no adequate foundation laid to show that the testimony is in fact the full, true and complete transcript of the testimony of Mr. Fagerhaugh; and furthermore, that it would not be the best evidence of that testimony. It is our belief that the proper way to prove the very crucial question of what actually was said at that time is by producing the court reporter and having him identify his official transcript for the record.

Mr. Nelson: May it please your Honor, under the rules of Criminal Procedure, of course, an official record is admissible. I would simply ask, your Honor, then to admit it for such evidentiary value it may have on the subject. If [9] better evidence is produced to show that this transcript is incorrect in any way by the defendant, of course your Honor is free to accept that evidence.

Mr. Edises: Well, your Honor——

The Court: How is it authenticated? May I see it?

Mr. Edises: May I say, your Honor, that there is no question that that is an official volume of the Committee, but that's not the issue. The issue is what was the testimony of Mr. Fagerhaugh? The version offered in and of itself shows that certain portions of Mr. Fagerhaugh's testimony were stricken.

I might call your attention, for example, to page

3368. It is just about the fifth line where there appears this statement. First there is a question by Mr. Kunzig;

“Where are you employed?”

And that is followed by this statement:

“Upon order of the Chairman, certain remarks of the witness were ordered stricken at this point.”

Now, we have no way of knowing what those remarks were. Perhaps they were in answer to the question; there is no way of telling as far as this report is concerned.

So we renew our objection on the ground no proper foundation has been laid and that they are not the best evidence on this crucial question.

Mr. Nelson: Well, your Honor, as far as the foundation [10] goes I will refer your Honor to Rule 7 of the Rules of Criminal Procedure which provide that an official record or entry therein or lack of such record or entry may be proved in the same manner as in civil actions, and I then ask your Honor to look to Rule 44 of the Rules of Civil Procedure which provide that an official record or entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody.

I further direct your Honor's attention to two sections of Title 28, rather, one section of 28, Section 1733——

The Court: What is that?

Mr. Nelson: Section 1733 of Title 28, United States Code, which further deals with the proof of government records and papers.

The Court: 1733?

Mr. Nelson: That's correct, your Honor. "Books or records of account, or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept."

I might say, your Honor, we will have testimony from a witness who was present at the hearing who will go over the transcript, but we do offer, your Honor, as evidence of exactly what was said at that time.

Mr. Edises: Do I understand counsel to be stating that [11] the court reporter will be produced to testify to the actual testimony?

Mr. Nelson: No, you do not.

The Court: Where is the court reporter?

Mr. Nelson: Where is the court reporter? I have no idea, your Honor. It has never been the practice in proceedings of this type to produce the court reporter, or his notes, where there was an official printed transcript—that is, of Committee hearings.

The Court: I don't know whether counsel's objection is good or not. I will take the matter under advisement, but if the court reporter is available I would think he would be—I don't know that the reporter is carried around by the Committee or whether they get the reporters in the locality in which the Committee hearing is held.

Mr. Nelson: It varies with the situation, your Honor; sometimes they do.

The Court: You might make some effort to find out if there is such a court report available.

Mr. Nelson: Very well, your Honor.

The Court: I will mark the last exhibit, Exhibit 8 for identification at this time. I will admit it in evidence subject to a motion to strike, so that we may have a record here.

(Whereupon copy of transcript, "Part IV," referred to above, was marked Government's Exhibit [12] No. 8 for identification.)

Mr. Nelson: I believe under the rules cited to your Honor it is admissible. Objections of the type made by counsel for the defendant go to its weight only.

The Court: All right.

Mr. Edises: May I inquire of counsel, through the Court, whether he intends to offer the rest of the volumes of the Committee's proceedings in San Francisco? You have offered, I believe, Volumes I and IV. Presumably on the same theory of relevancy for which you offered these, the others should likewise be presented to the Court as part of the general settings, which the cases indicate is pertinent to a proceeding of this kind.

Mr. Nelson: I think, your Honor, his point may well be taken, with regard to the defense of the privilege against self-incrimination, the setting is important. However, I would say that that is part of the defendant's case, and if he wishes to introduce those volumes in evidence as part of his

case, we will have no objections to Volumes II, III and V.

The Court: Do you have them?

Mr. Nelson: No, I do not.

Mr. Edises: Simply in the interests of an orderly record I think they all ought to go in at this time, since they are part of a similar pattern.

The Court: Do you have them, counsel? [13]

Mr. Edises: I have Volume III. I don't, apparently, have them with me, but I believe I can obtain them. May I ask that——

The Court: If you produce them, counsel, you may offer them and we will mark them.

Mr. Edises: I suggest that appropriate numbers be reserved now so that they will occupy substantially the same place in the record.

Mr. Nelson: I submit, your Honor, they are part of the defendant's case, not the Government's,

The Court: I will permit you to offer them, Mr. Edises; they will be given appropriate markings.

Mr. Nelson: The Government calls Mr. William A. Wheeler.

WILLIAM A. WHEELER

called as a witness on behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Court: State your name, please.

The Witness: William A. Wheeler.

(Testimony of William A. Wheeler.)

Direct Examination

By Mr. Nelson:

Q. What is your address, Mr. Wheeler?

A. 325 West Brookdale Place, Fullerton, California.

Q. What is your occupation?

A. I am an investigator for the House Committee on [14] Un-American Activities.

Q. Where are you stationed, Mr. Wheeler?

A. Stationed in Los Angeles.

Q. Will you describe very briefly to the Court your previous government service?

A. 1942 I was employed as Deputy United States Marshal in Los Angeles, California; remained there for a year. Then I became an agent for the United States Secret Service for a period of 18 months. I then enlisted in the United States Army, and my principal assignment there was—I was assigned to the Criminal Investigation Division, and my army career lasted for two years.

Subsequent to that I was restored as an agent of the United States Secret Service for approximately a year.

I resigned from the Treasury Department and accepted this position in 1947, and I have been investigator for the Committee since that time.

Q. Can you state very briefly your duties, Mr. Wheeler?

A. Well, practically the same as any investigator. I receive assignments from the Committee and in-

(Testimony of William A. Wheeler.)

investigate the areas that they desire to be investigated, submit reports.

Q. Have your investigations included the San Francisco area? A. Yes, sir.

Q. Do you know the defendant in this case, Mr. Ole Fagerhaugh?

A. I recognize him as being present. [15]

Q. Do you recall when you first saw him?

A. It was the day he appeared before the Committee. That would be the 4th day of December, 1953.

Q. Do you know whether or not a subpoena was issued for this gentleman? A. It was, sir.

Q. Do you know what return was made on that subpoena?

A. Yes, sir. As I recall, the subpoena was issued on the 16th day of November, 1953, and it was given to the Chief of Police at Oakland, Lester J. Devine. An officer of the Oakland Police Department served the subpoena.

Q. Do you know whether or not a return showing service was made on that day?

A. Yes, I have that subpoena with me, the return.

Q. What was the date on which Mr. Fagerhaugh was in fact called to testify before the sub-committee?

A. He was called to testify on December 3. A telegram had previously been sent to him advising him to appear on the 3rd.

(Testimony of William A. Wheeler.)

Q. What day was he actually called to make his testimony?

A. He was called to testify on the 4th of December.

Q. And was it this gentleman who responded at that time?

A. The gentleman in the middle, yes.

Q. Where were those hearings being held, Mr. Wheeler?

A. In the Board of Supervisors' room in the City Hall in the City of San Francisco. [16]

Q. Was that a Committee hearing or a sub-committee hearing?

A. A sub-committee hearing.

Q. How do you know that?

A. Well, there were four members of the Committee, and Chairman Velde at the beginning of the hearing on December 1 set up a sub-committee constituting of himself as chairman, and three other members.

Q. Do you know whether or not he again set up a sub-committee on December 4?

A. I have no independent recollection.

Q. Would the transcript of that day's hearing reflect it if he did so?

A. Yes, it would.

Q. How many members were there on that sub-committee on December 4?

A. There were four.

Q. How many of those four members were present on December 4, 1953, when the defendant took the stand?

(Testimony of William A. Wheeler.)

A. I have no independent recollection. However, I do know that a quorum was present.

Mr. Edises: Object to it, calling for the witness' conclusion. Ask the portion dealing with that conclusion go out.

The Court: It may go out.

Q. (By Mr. Nelson): Have you reviewed the transcript of that [17] day's proceeding, Mr. Wheeler? A. Yes, I have.

Q. How many members of the sub-committee does the transcript reflect were present when the defendant took the stand? A. Four.

Q. Were all four of those members of the sub-committee present throughout the defendant's testimony?

A. No, sir, after I reviewed the testimony, Congressman Jackson, Donald, left the hearing room for a short period of time.

Q. Were the other three members of the sub-committee present throughout the defendant's testimony? A. They were.

Q. Was the defendant sworn before he took the stand? A. He was.

Q. What subject, generally, was the Committee investigating at the time of the hearings which were held in San Francisco?

Mr. Edises: Objected to on the ground no proper foundation has been laid.

The Court: I am inclined to think the objection is good. Does the transcript show what was said at the time?

(Testimony of William A. Wheeler.)

Mr. Edises: Well, your Honor, I am not suggesting that counsel must limit it necessarily to that, but I think he must qualify this witness and show the basis of his knowledge.

Q. (By Mr. Nelson): Do you know what the subject was, [18] generally, that was being investigated by the subcommittee on December 1, 2, 3, 4 and 5 of 1953, Mr. Wheeler?

A. Well, yes, sir.

Mr. Edises: Just a moment.

Q. (By Mr. Nelson): How do you know what that subject was, Mr. Wheeler?

A. I was assigned by the Committee approximately—or given an assignment to investigate the Bay Area in regard to the nature, the extent and objects of the Communist Party in this area. Now, this assignment I received approximately six months prior to the hearings, and the investigation took place approximately six months before the hearings began.

Q. Do you know if Chairman Velde of this Committee and of the subcommittee made a statement for the record of the purposes of the hearings which were held in San Francisco?

A. That is true, at the beginning of the hearings on December 1.

Q. On December 1? A. Yes, sir.

Q. You were present on that day, were you?

A. I was.

Q. Did you hear that statement? A. I did.

Q. Did his statement of the purposes of the

(Testimony of William A. Wheeler.)

hearings in any way differ from the statement you have just given? [19]

A. Not that I know of.

Mr. Edises: May I have just a moment? May that go out, your Honor, as a conclusion of the witness?

The Court: That may remain in.

Mr. Edises: May I have Exhibit——

The Court: The exhibits are here.

Q. (By Mr. Nelson): Mr. Wheeler, I will show you Government's Exhibit 7 in evidence which purports to be the transcript of the hearings held on the first day of December, 1953. I will ask you to state for the Court on what pages may be found Mr. Velde's statement of the purposes of the hearings which were held.

A. The statement begins on page 3055, concludes on the bottom of page 3056.

Q. I will ask you, Mr. Wheeler, what significance the place of employment of witnesses called to testify before the Committee, or a subcommittee, had?

Mr. Edises: Objected to as calling for the opinion and conclusion of the witness, no proper foundation, no adequate showing of his qualifications to answer that, and furthermore, he is being asked to testify to what the Committee's objectives were in this regard without any showing of how, where or under what circumstances he learned such objective.

(Testimony of William A. Wheeler.)

Mr. Nelson: Well, your Honor, he has testified he was the investigator—— [20]

The Court: I am inclined to think the objection is good. Sustained.

Q. (By Mr. Nelson): Did you have any connection, Mr. Wheeler, with preparing questions which were asked of the various witnesses who testified at these hearings? A. Yes, sir.

Q. How did you know what to direct your questions to, what subjects?

A. Well, principally the subjects under investigation. I conducted the investigation prior to the hearings of the Committee and prior to the arrival of counsel, and I based these questions on the knowledge I obtained during the investigation.

Q. Had you ever been informed by any Committee member, or any Committee member's staff, along what lines to investigate, to make your investigation?

A. Well, as I previously stated, I was given an assignment to learn or attempt to develop a hearing which would disclose the extent, the nature and the objects of the Communist Party in the Bay Area.

Q. Now, I notice that at least one witness, to wit, Mr. Fagerhaugh, in the transcript, which is in evidence, was asked: "Where are you employed?" Will you state what significance that question had?

Mr. Edises: May it please the Court, I think the question is again objectionable on the same ground. This man is a [21] private investigator on the

(Testimony of William A. Wheeler.)

public payroll and there is no showing that there was any communication from him—from the Committee, rather, to him, which would qualify him to answer this particular question. If he is to be asked this question, at the very least there should be a showing of the time and place and circumstances under which the Committee communicated its views with respect to this question to the witness. There has been no such showing.

The Court: I think you might develop whether this witness has any knowledge or fact that would permit him to answer the last question.

Q. (By Mr. Nelson): I think you testified you had been an investigator for the Committee since 1947, is that correct? A. That is right.

Q. I wonder if you can estimate how many hearings similar to the hearings held in San Francisco in December, 1953, you have participated in?

A. Well, I have participated in one hundred hearings—this is geographical hearings, taken in a whole area—I would imagine of this particular type, maybe seven or eight. It would be hard.

Q. Seven or eight geographical hearings, is that correct? A. That is true.

Q. And perhaps one hundred hearings of the Committee?

A. Yes. I mean by hearing, lasting half a day, one day, or [22] similar to that, short period of time.

Q. Have you had a hand in preparing the questions asked witnesses in other hearings besides this

(Testimony of William A. Wheeler.)

one? A. That is true.

Mr. Nelson: Your Honor consider that as sufficient foundation?

The Court: No, not quite, counsel. I would like the knowledge of this witness himself as to what knowledge he has of the subject of this inquiry.

Mr. Edises: May I be permitted to make this observation, your Honor, that in addition we would like to know, as part of the foundation, something about the particular question which is at issue here. It is very interesting to hear about his broad experience in other inquiries, but the defendant here is not on trial for anything that happened in any of those other inquiries.

The Court: I take it the background experience has been established here, but I would like to know what knowledge he has, counsel, of this subject of the inquiry.

Mr. Nelson: Of the general subject of the inquiry, your Honor?

The Court: You say he is an investigator. That doesn't mean he has any knowledge.

Q. (By Mr. Nelson): What were your directions along the lines which your investigation should be conducted? How were they [23] transmitted to you, Mr. Wheeler?

A. It may have been by correspondence or it may have been by telephone.

Mr. Edises: I shall move that go out as not responsive and not an indication of any personal knowledge on the part of the witness.

(Testimony of William A. Wheeler.)

The Court: Well, I think that goes to the weight of it, counsel. It may remain.

Q. (By Mr. Nelson): You simply don't recall which at the present time?

A. I do not recall which at the present time.

Q. Do you recall from whom the directions came?

A. It would come from the Chief Investigator of the Committee.

Q. At that time who was he?

A. Louis J. Russell.

Q. What were your directions as to the subject along which you were to conduct your investigation?

A. I was instructed to proceed to San Francisco and conduct an investigation to determine if the Communist Party had enough strength here, had infiltrated in any of the basic industries or defense industries; then submit a report with a recommendation whether or not a hearing should be held in this area.

Q. Did you subsequently submit such a report?

A. That is true. [24]

Q. When the hearing was arranged and Committee counsel appeared here, you worked with them, did you not, in preparing questions for the witnesses? A. I did.

Q. Can you now tell the Court what significance that question, the question "Are you employed?" had to the Committee at this time?

Mr. Edises: May it please the Court, I don't think that he has supplied the foundation.

(Testimony of William A. Wheeler.)

The Court: Well, I think it could be developed more, counsel. Possibly I haven't made myself clear. The exhibit that I have in my hand, type-written record, is headed "Investigation of Communist Activities in the San Francisco Area."

The Witness: Yes, sir.

The Court: Did you make such an investigation?

The Witness: I did, sir.

The Court: Did you receive any information concerning such activity?

The Witness: I did, sir.

The Court: Did you at that time know whether or not there were any activities in the San Francisco area?

The Witness: Yes, sir.

The Court: In the course of your investigation did you ascertain whether or not certain individuals alleged to be taking part in those activities were engaged in industry in [25] the Bay Area?

The Witness: Yes, sir.

The Court: Was that a part of your investigation to determine whether or not they were engaged in industry in the Bay Area?

The Witness: It was, sir.

Q. (By Mr. Nelson): Do you know, Mr. Wheeler, what the primary purpose of asking the question "Where were you employed?" was in this instance? A. Yes, sir.

Q. What was it?

Mr. Edises: Now, just a moment. Again I don't believe that is the proper way. I think I know what

(Testimony of William A. Wheeler.)

counsel is trying to get at; I don't think the proper way is by asking this witness to state the purpose of the inquiry which necessarily can be indicated only by the source from which policy-making emanated. This witness has not shown to have been in any policy-making capacity, nor is it—nor has it been demonstrated there was any communication or instructions to him from anyone in a policy-making capacity in the Committee. Therefore, I submit he is not qualified to answer that question.

Mr. Nelson: Your Honor, he arranged the investigation; he had a hand in drawing the questions. How could anyone have a better knowledge of what the questions meant to the subcommittee? [26]

The Court: I think the record itself will have to show what it meant to the Committee, counsel, within evidentiary limits. But I have asked certain questions, you asked certain questions going along that line.

Were you instructed by the Committee or by any member of the Committee to ascertain whether or not there were any Communistic activities in industry in the Bay Area?

The Witness: That is true; yes, sir.

The Court: In doing that did you ascertain the places of employment——

The Witness: That was part——

The Court: ——of various persons alleged to be engaged in those activities?

The Witness: That was part of the assignment and part of the investigation, yes.

(Testimony of William A. Wheeler.)

Q. (By Mr. Nelson): Mr. Wheeler, did your subpoenas sometimes carry the addresses, the business addresses of witnesses?

A. They do, sir, yes.

Q. It is possible, is it not, that when a witness appearing in a hearing—his address might have changed from the address which is on the subpoena?

A. It is.

Q. It is possible, is it not——

Mr. Edises: Just a moment. I am going to object and ask that question and answer be stricken on the ground it is [27] leading and suggestive.

The Court: It is leading and suggestive, counsel. It may be stricken.

Q. (By Mr. Nelson): Do you know whether or not addresses of witnesses testifying before the Committee are ever different from the addresses which appear on subpoenas?

Mr. Edises: Objected to as leading and suggestive.

The Court: It may be answered yes or no.

The Witness: Repeat the question.

Q. (By Mr. Nelson): Do you know whether the address of witnesses testifying before the Committee are ever different from the addresses which have appeared on the subpoenas issued to them by the Committee?

A. Well, there have been typographical errors. A person could move during the period of time the subpoena was issued and the period of time he testified.

(Testimony of William A. Wheeler.)

Mr. Edises: I ask the answer go out, your Honor, as not responsive, and as a volunteered statement of the witness.

The Court: It may remain.

Q. (By Mr. Nelson): To your knowledge in any Congressional hearing has a person with an identical name been called and found to be not the person who the Congressional Committee desired to have testify?

Mr. Edises: Objected to as irrelevant, remote and immaterial, calling for speculation, as well as conclusion on [28] the part of the witness.

Mr. Nelson: Have to show why that question was asked, your Honor? It is very relevant.

The Court: I will permit the answer.

A. I can't recall that instance happening before our Committee.

Q. (By Mr. Nelson): Ever recall it happening before any Committee?

Mr. Edises: Objected to as remote.

The Court: Sustained.

Q. (By Mr. Nelson): Generally speaking, Mr. Wheeler, on what subjects was the defendant to be questioned by the Committee, if you know?

A. He was to be questioned regarding his alleged membership in the Communist Party, his knowledge of the Communist movement in the Bay Area.

Mr. Nelson: You may cross-examine.

(Testimony of William A. Wheeler.)

Cross-Examination

By Mr. Edises:

Q. May I see the subpoena to which you referred?

A. Yes, sir. (Witness handing paper to counsel.)

Mr. Edises: I would like to offer the subpoena in evidence, may it please the Court.

The Court: It may be marked Defendant's Exhibit A. [29]

(Whereupon the subpoena dated October 16, 1953, referred to above, was received in evidence and marked Defendant's Exhibit A.)

Mr. Nelson: May I see that, counsel?

Q. (By Mr. Edises): Mr. Wheeler, you referred to a report which you say you submitted to the Committee members the results of your investigation into Communist activities in the San Francisco Bay Area; do you have that report?

A. It is a report, could be either verbal or written. I wouldn't know at this time.

Q. What was it? A. I don't know.

Q. When did you make such a report?

A. I would have to give an approximate date. I would say around October, 1953, recommending that a hearing be held.

Q. Where did you make the report?

A. I would make it to the Chief Investigator, at that time Louis J. Russell.

(Testimony of William A. Wheeler.)

Mr. Edises: I ask the answer be stricken as not responsive.

The Court: Did you make it to Russell?

The Witness: Yes.

Q. (By Mr. Edises): Where did you make it?

A. Well, it was either written at my residence at Fullerton and mailed to him, or made it over the telephone by long [30] distance.

Mr. Edises: I ask the answer be stricken as not responsive and the witness instructed to answer responsively.

The Court: I think the answer is responsive, counsel.

Q. (By Mr. Edises): Now, Mr. Wheeler, as I understand your testimony, you were instructed by the Committee to investigate Communist activity in the San Francisco Bay Area, with particular reference to industry, is that right?

A. The Committee—it is a foremost interest of the Committee to investigate defense industry, yes.

Q. So that the answer is yes?

A. It would be, yes.

Q. Yes. And I would like to ask you to particularize on that. What aspects of Communist activity in defense or other industry in the San Francisco Bay Area were you instructed to investigate?

A. There was no specific instruction.

Q. You mean all that you had was a roving authority without any guidance from the Committee at all as to what you were to do, is that right?

A. Well, I wouldn't word it that way.

(Testimony of William A. Wheeler.)

Q. Well, how would you word it?

A. I would say that I was given authority to investigate Communist infiltration in the Bay Area, and it was a blanket authority. [31]

Q. Now, you speak of Communist infiltration in the Bay Area. What do you mean by that?

A. Infiltration in various industries.

Q. Well, define what you mean by "infiltration."

A. Well, infiltration is the penetration of a small group of people into any given organization or industry.

Q. Well, what was the interest of the Committee in this so-called Communist infiltration of industry?

A. To determine if it did exist.

Q. Now, what was the concern of the Committee with the existence of this so-called infiltration?

Mr. Nelson: Objection, your Honor. I don't understand the word "concern."

Mr. Edises: It is not a very long word.

The Court: No, but you understand the question?

The Witness: Yes, sir.

The Court: You may answer.

Q. (By Mr. Edises): Want to step down and explain it to counsel?

The Court: Counsel, let us not have any side remarks or any—

Mr. Edises: Withdraw the statement.

The Court: We are proceeding here in a serious matter and I want counsel on both sides to act that way.

(Testimony of William A. Wheeler.)

Mr. Edises: I regret the remark, your [32] Honor.

The Court: All right.

Mr. Edises: I will cease any effort at all to introduce any levity into the proceeding.

Q. Mr. Wheeler, I believe the Court has indicated that you may answer the question.

A. Would you repeat the question?

(Record read by the reporter.)

A. The Port of San Francisco is a very important city in the defense program of the United States. It has been said so repeatedly on the floor of the House by the members of the Committee, and also by the Armed Forces. If the Communist Party has infiltrated in this city it is very important that the Congress know it.

Q. Well, what was the—what did the Committee regard as the danger or the menace or the peril, or however you want to put it, of this so-called Communist infiltration into this important area?

Mr. Nelson: Objection, your Honor, unless he brings out whether or not he knew such things as the Committee's worry about danger and menace and so forth. My qualification of him didn't go that far.

The Court: I take it that the question as to his instructions from the Committee, that you may cross-examine as to his activities. What you now are asking him is what the belief of the Committee is as to certain matters of which he is only [33] the

(Testimony of William A. Wheeler.)

investigator, and I think that might be beyond the scope of the direct examination, counsel.

Mr. Edises: May it please the Court——

The Court: If he received any instructions to that effect, you may ask about those.

Mr. Edises: Very well.

Q. I understand that you were conducting your various activities under the direction of the House Un-American Activities Committee, is that right?

A. Yes, sir.

Q. And in the course of your services for them I presume that you had numerous consultations with the Committee and the authorized representatives of the Committee?

A. No, sir.

Q. You did not?

A. I did not. Over what period of time—I mean, you mean from the inception, when I started, or right prior to the hearing?

Q. Yes. In qualifying you, Mr. Wheeler, counsel went into your entire, your long period of employment by the Committee, and you used that as a basis for stating what the purpose of this inquiry was. You were asked that question, and I am trying to find out from you a little more about the purpose of the question, and therefore my present inquiry is how you gained your knowledge. Did you gain your knowledge of the purposes of [34] the inquiry by—well, put it this way:

How did you gain your knowledge of the purposes of these inquiries, and particularly the San Francisco inquiry?

(Testimony of William A. Wheeler.)

A. Well, as I stated, this investigation began approximately five or six months prior to the hearings. Now, during that course of time I had the opportunity to talk to numerous people—not numerous, but several people—that have been in the Communist Party. I took statements from these people under oath, I have taken—I have conducted hearings for the Committee myself.

Q. How did you know what questions to ask these people and what matters to inquire about?

A. I had been previously instructed by the Committee itself to ascertain the objects and nature and characteristics of the party here.

Q. All right, then, that is what I want to get at. I would like to have you give us in as much detail as you can what the Committee told you about the specific type of information or inquiry that they wanted you to pursue.

A. I have already stated it.

Q. Tell us again, then, and don't—if possible, avoid using terms which are terms of art, like "infiltration," and tell us concretely what you mean by those things.

A. Well, I like to express myself the way I want to.

Q. Yes, go ahead. [35]

A. Would you repeat the question?

Q. Tell us—I will try to state it more succinctly. Tell us specifically what you were instructed by the Committee or by the Committee's representatives

(Testimony of William A. Wheeler.)

to look for or to inquire about in your investigation of Communist activities in this area.

A. Approximately six months before the hearing I was instructed by the Chief Investigator, Louis J. Russell, to investigate the San Francisco Bay Area to determine if the Communist Party had made any progress in organizing unions, infiltration of organizations, had penetrated defense industries, or any other subject concerning the Communist Party, and then to make a recommendation, if the information gathered would warrant a hearing. It was important enough to bring four or five members of Congress out here, at least in our opinion.

Q. All right. You have used the word "penetrated"; used the word "infiltrated." I will ask you what you understood those terms to mean in connection with the instructions you received from the Committee.

A. I would like to have my answer read back concerning the term infiltration, which I previously——

The Court: You may answer this question.

The Witness: I understood the Committee—the word "infiltration" to mean, in my particular investigative work concerning the Communist Party, that a small group of Communists [36] infiltrate, go into an organization and industry and seek to influence it and gather control. And penetrate—I would give the same definition.

Q. For what purpose? For what end?

A. Now, I don't follow you.

(Testimony of William A. Wheeler.)

Q. The question is penetrate or infiltrate for what purpose?

Mr. Nelson: Object——

A. To influence this organization.

Mr. Nelson: Already testified——

The Court: He may answer that; I think he has answered it before.

A. (Continuing): To influence this organization in its policy, to capture control of this organization, to wield it toward the Communist line for that particular time.

Q. Did you have any information or any evidence before you as to what those purposes were for which the Communists were infiltrating industry?

A. Not when I began the investigation.

Q. Well, as you proceeded? A. Certainly.

Q. And what was that?

Mr. Nelson: Objection, your Honor. This doesn't go to the subject of inquiry. The Government purposely limited the witness' testimony to the subject of pertinency. Now, he is trying to put in a defense case by way of cross-examination. [37] I submit, your Honor, that he can call the man as his own witness at the present time.

Mr. Edises: May it please the Court, it doesn't seem to me that the question of pertinency, which is part of the Government's affirmative case here, is to be confined to what the Government counsel thinks is proper to bring out on direct examination, and that I am to stand here helpless, unable to go

(Testimony of William A. Wheeler.)

into any of the details of what he has brought out on direct examination.

Now, all of these things are matters that were gone into in direct examination in outline, and I am simply now endeavoring to fill in the outlines, as is proper, it seems to me, under cross-examination.

The Court: I don't know, counsel, that you have a right under cross-examination to ascertain the results of his investigation. He was put on merely for the purpose of showing he was making an investigation, made a report for the purpose of a hearing, and these persons were to be brought before that hearing. But I do not think by cross-examination that you are entitled to obtain from this witness all of the results of his examination.

Mr. Edises: Perhaps I am—maybe I phrased it in an unfortunate way, but on direct examination counsel endeavored to establish that the purpose of the inquiry was to investigate so-called Communist infiltration or penetration of industry in [38] the San Francisco Bay Area. Now, I simply want to get some more detail, some understanding of that purpose.

The Court: Well, I think he has given you that, counsel, in answer to your question.

Mr. Edises: He has given me a certain portion of it.

The Court: Now asking what he found, and I don't think that is the same thing as asking him the result of his investigation, and I don't believe that that is within the realm of cross-examination.

(Testimony of William A. Wheeler.)

Mr. Edises: Well, let me put it a little differently.

Q. Am I correct, Mr. Wheeler, in understanding your testimony to mean that the purpose of the inquiry was to investigate the extent to which Communists were infiltrating or penetrating industry in the San Francisco Bay Area for the purpose of promoting the Communist Party line, is that right?

A. For promoting the Communist Party—it was all related, so no different.

Q. For promoting the Communist Party and the Communist Party line, is that right? A. Yes.

Q. And what relation to the purpose of the inquiry did the so-called development of the Communist Party line play?

A. I don't follow your question.

Q. Well, you answered in response to one of my questions that one of the purposes of the infiltration which you are inquiring [39] into was to promote the Communist Party line.

The Court: Now, counsel, that was an expression that you used yourself. The witness first said he didn't know what you were talking about, finally added it to another phrase, and he accepted the phrase. That was your phrase, not the witness'.

Mr. Edises: May I respectfully dissent from your Honor's observation. I think the record will show he first used the expression.

The Court: I don't recall he did. Go ahead.

Q. (By Mr. Edises): You remember whether you first used that expression, Mr. Witness? Didn't

(Testimony of William A. Wheeler.)

you use the expression "Communist Party line"—
"promoting the Communist Party line"?

A. That is correct.

The Court: You used that expression today?

The Witness: Yes, as I recall.

The Court: I am sorry, I didn't recall that.

Mr. Edises: I believe he did, your Honor.

Mr. Nelson: I submit, your Honor, that he has testified the purpose of the inquiry was to find out whether there had been any infiltration, not what the purpose of such infiltration might be.

The Court: You have your objections to the questions as they come up. There is nothing pending now.

Mr. Edises: I believe there is. I will reframe the question. [40]

Q. What did you understand—what did you have in mind when you used the expression, "promoting the Communist line in industry"?

Mr. Nelson: I will object, your Honor, as being beyond the scope of the direct examination and irrelevant.

The Court: I will permit the witness to answer that question briefly, if he can.

Mr. Edises: Would you read the question?

(Record read.)

A. Well, that would relate directly to the men in industry who are members of various unions where resolutions were passed in these unions on the floor that advocate the Communist Party line

(Testimony of William A. Wheeler.)

and are run concurrently with the Soviet foreign policy.

Q. What does the place of employment of a witness have to do with the purpose of your inquiry?

A. The routine question for identification of the witness.

Q. No other purpose at all?

A. In the event the witness has moved since the issuance of the subpoena, and the fact that there are citizens in the community who bear the same name, it might do an injustice just asking a person what his name is. He says "John Smith." I think it would do all the John Smiths in the Bay Area a gross injustice.

Q. I see. Now, Mr. Witness, I want to get this straight. The only purpose that the subcommittee had in mind in asking [41] Mr. Fagerhaugh where he was employed was to be sure that you have the right Mr. Fagerhaugh and not confuse him with some other person, is that right?

A. That is my opinion, from my viewpoint as an investigator of the Committee. I have never heard the other members express themselves.

Q. Are you able to tell us what the pertinency of that question was from the standpoint of the Committee?

Mr. Nelson: Been asked and answered, your Honor.

The Court: He may answer if he can; yes or no.

A. I don't know what is in the gentleman's mind on the Committee, but every place I have appeared

(Testimony of William A. Wheeler.)

as a witness, they always asked me my address and where I was employed.

Q. Now, do you recall the testimony of Mr. Fagerhaugh on the occasion in question?

A. Well, I was present. I couldn't repeat it verbatim, no, or if you repeated it to me I don't know. I don't know what you have in mind.

Q. Do you recall whether or not Mr. Fagerhaugh's street address appeared on the subpoena that was issued for him?

A. A street address appears on the subpoena issued to him. I assume it is his address.

Q. And do you recall whether the witness, Mr. Fagerhaugh, was asked at the hearing what his residence address was?

A. I believe he was. [42]

Q. Don't you remember the following question being asked and the following answer being given? I am reading from page 3667, counsel.

"Mr. Kunzig: ——"

By the way, who is Mr. Kunzig?

A. Mr. Kunzig is counsel for the Committee on Un-American Activities.

Q. "Mr. Kunzig: Mr. Fagerhaugh, would you state your address, please?"

"Mr. Fagerhaugh: I live at 2285 East 19th Street, Oakland."

You recall that question being asked and the answer being given?

A. I have no independent recollection. However,

(Testimony of William A. Wheeler.)

if it is in the transcript I certainly think it was asked.

Q. Now, when that question was asked of Mr. Fagerhaugh—by the way, you recall also that he stated his name to be Ole Fagerhaugh, don't you?

A. Yes.

Q. When he was asked and answered the question as to his name and address, did the Committee not consider that he had identified himself as the person whom they wanted to subpoena?

Mr. Nelson: Objection, Your Honor; not qualified to answer that.

The Court: Sustained.

Q. (By Mr. Edises): Did you not, as a representative of the [43] Committee at that time who had participated, by your own admission, in formulating these questions, not consider that he had identified himself as the Ole Fagerhaugh you wanted to question? A. I certainly did not.

Q. You certainly did not? In other words, you were of the opinion that there might be two Ole Fagerhaughs living at 2285 East 19th Street, Oakland, and you didn't want to take any chance of confusing them, is that right?

A. That is right.

Q. I take it, then, Mr. Wheeler, from your answers, that the question of where a person is employed, what industry he is employed in, is a matter of complete indifference to the Committee, is that correct?

(Testimony of William A. Wheeler.)

Mr. Nelson: Objected to, Your Honor; nothing in the evidence to show that——

The Court: Sustained.

Mr. Nelson: ——any question was asked what industry he was employed in.

Q. (By Mr. Edises): Were you, in the course of your investigations for the Committee and pursuant to their instructions, investigating the International Longshoremen and Warehousemen's Union or any of the industries organized by the International Longshoremen and Warehousemen's Union?

Mr. Nelson: Objected to, Your Honor; beyond the scope of [44] the direct examination, not who he was investigating, but what the purposes of the investigation were is all that he testified to.

Mr. Edises: May it please the Court, it seems to me that the witness on his own direct examination testified that the investigation of industry, so-called Communist infiltration of industry in the Bay Area, was a part of the purpose of the investigation.

The Court: That's right, but I think you are still asking now for what he found in his investigation, counsel.

Mr. Edises: Very well, I will rephrase that.

Q. Was one of the purposes of your investigation to investigate any aspects of the functions or operations of the International Longshoremen's and Warehousemen's Union in this area?

A. I have no specific instructions to investigate the ILWU.

(Testimony of William A. Wheeler.)

Q. Did you have any instructions of any kind with respect to the ILWU in this area?

A. No, sir.

Q. Did you have any instructions with respect to investigating any of the industries organized by the ILWU? What is your answer?

A. Well, we were interested in the California Labor School. I don't know whether it is an instruction or not.

Q. Was one of the purposes of your investigation, Mr. Wheeler, investigating the penetration or infiltration of Communists into [45] industry in the Bay Area?

A. Yes, but I am not instructed to investigate this or that.

Q. What industries were you told to inquire into?

Mr. Nelson: Been asked and answered, Your Honor.

The Court: I think he has.

Mr. Edises: I don't believe he answered that question, Your Honor.

The Court: I think he has answered, no special industry, but he gave them certain designations, not any particular ones.

Mr. Edises: I submit that I should be permitted a certain latitude on cross-examination, Your Honor.

The Court: Perfectly willing to give you that, counsel, but I am not going, in this trial, which involves merely one issue, I am not going to have

(Testimony of William A. Wheeler.)

this witness testify as to the results of his investigation.

Mr. Edises: I don't wish to go into that, and as a matter of fact these questions I am asking go now to the purpose of his investigation and I intend to be limited to that; not asking him about his findings and I would like to make that clear. I am asking whether his instructions contemplated—

The Court: He answered.

Mr. Edises: —an investigation or whether he understood his authority to include an investigation into industries organized by the ILWU.

The Witness: I said no. I repeat it. [46]

Q. (By Mr. Edises): Were you aware at the time that you undertook your investigation, Mr. Wheeler, or at the time that you prepared your questions to be asked of witnesses, that Mr. Harold H. Velde, Chairman of the Committee, had publicly stated as follows:—

Mr. Nelson: Your Honor, I will object to that.

The Court: Let him finish the question, counsel.

Q. (By Mr. Edises): “The subject of the San Francisco investigation will be Communist infiltration into unions in Northern California. Mr. Velde said particular attention would be given to Harry Bridges, President of the International Longshoremen and Warehousemen's Union.”

Mr. Nelson: I will object on the basis there is no qualification of the source of his information.

Mr. Edises: I am asking him whether he was aware of it.

(Testimony of William A. Wheeler.)

Mr. Nelson: The witness hasn't said he was aware of any of them.

The Court: He was asked whether he is aware. You may answer yes or no.

The Witness: Would you read it again?

(Record read.)

A. I don't know the date of your newspaper article, Mr. Edises, but I imagine that that was a statement by Mr. Velde after I had concluded a preliminary investigation and had [47] reported some of the results to Washington and said it looked like the ILWU and some of the related unions were Communist infiltrated.

Q. (By Mr. Edises): Did you make such a statement in your report?

The Court: It is immaterial whether he did or not, counsel.

Mr. Edises: May it please the Court, I believe that it is certainly reasonable inference from the testimony that the Committee's inquiry was based at least in part on his report. In the second place, I think he testified that it was. Now, how can we learn the purpose of the Committee's inquiry in order to determine the pertinency of the question asked without going into this matter?

The Court: Proceed.

Mr. Edises: May I state, Your Honor, had the Government called Mr. Velde or called someone else who had direct responsibility, we would then be in a position to ask these questions directly. But

(Testimony of William A. Wheeler.)

the Government has not called Mr. Velde, and under the circumstances we are bound to use what, in substance, is secondary evidence; hence the more or less indirect way we have to go at this.

Was there an answer to the last question?

The Court: I said it was immaterial, counsel, the last question. Proceed to the next question.

Q. (By Mr. Edises): Now, when did the Committee open its [48] hearings in San Francisco, Mr. Wheeler? A. December 1, 1953.

Q. Were you present at any conferences of the Committee members with the press in which they made statements as to the purpose of the inquiry?

A. What period of time?

Q. Let us take around the opening date of the hearing, say the day they opened, or the day before.

A. I believe I was present when a member of the press interviewed Congressman Jackson. Now, I can't say for sure, I mean when, two or three days before the hearing started. Everything is in a turmoil, and I don't believe the whole committee called a press conference. If they did, I was not present, and I did not see Congressman Velde until the day the hearing started. He arrived late.

Q. Now, I asked you whether or not on or about the date that the hearings opened you were not present at a press conference with Representative Jackson in which Representative Jackson made the following statement:

"San Francisco was and is a natural target for the Communist conspiracy. Its vital defense activi-

(Testimony of William A. Wheeler.)

ties and its position as a great center of world communications render it a very desirable location for the infiltration effort.

“To what extent these efforts were [49] successful will be in a general way demonstrated during the forthcoming hearings.

“It is generally acknowledged that New York and California are the two focal points of the Communist attack. It is our job to determine what element of success attended the Communist efforts to obtain a firm foothold in this area. The Committee is particularly concerned with those aspects of infiltration which deal with vital defense and research establishments.

“Recent disclosures have indicated that no segment of our national life has escaped the attention of the Communist conspiracy and its agents.

“It has been established in sworn testimony that agents of the conspiracy were active in the San Francisco Bay Area in such deals as atomic research, national defense, communications, and labor.”

Mr. Nelson: Your Honor, I would submit no witness could say whether he was aware, having heard that verbatim.

Mr. Edises: Just a moment.

Mr. Nelson: He is going to read these long things into the record; have them broken up and ask sentence by sentence.

(Testimony of William A. Wheeler.)

Mr. Edises: Your Honor, the pending question is whether [50] he was present at a press conference where such a statement was made.

The Court: I recall the question. You may answer it, if you know.

The Witness: There was no press conference.

The Court: Just answer the question: Were you present at a press conference when that statement was made? Just answer the question yes or no.

The Witness: I don't know.

The Court: All right, that answers it.

Q. (By Mr. Edises): Were you present when Congressman Jackson made that or substantially that statement to any member of the press?

A. I was present with Congressman Jackson when he talked to a newspaperman on the Examiner.

Q. Was that Mr. Will Stevens?

A. That was Mr. Will Stevens.

Q. All right. Now, I ask you to look at this issue, rather, this clipping, from the the San Francisco Examiner of December 1, 1953, and tell us whether in substance——

Mr. Nelson: I will submit, Your Honor, it should be identified first before the witness testifies.

Mr. Edises: I am willing to identify it. Please mark this for identification. Mind if I use the photostat?

Counsel stipulated I may use the photostatic copies, Your [51] Honor. Please mark this for identification.

(Testimony of William A. Wheeler.)

The Court: Mark it Defense Exhibit B for identification.

(Whereupon photostatic copies referred to above were marked Defendant's Exhibit B for identification.)

Q. (By Mr. Edises): Now, showing you, or handing you Defense Exhibit B for identification, I will ask you whether you recognize the quotation attributed there to Congressman Jackson as in substance the remarks that Congressman Jackson made to Mr. Will Stevens on or about the time just mentioned? A. I do.

Mr. Edises: I would like to offer this in evidence as Defendant's Exhibit B, Your Honor.

Mr. Nelson: We will object, Your Honor. It hasn't been authenticated. It is heresay of the rankest order; it isn't relevant.

The Court: What is the purpose of the offer?

Mr. Edises: The purpose of it, may it please the Court, is twofold. First, it is a statement from a member of the Committee as to the purpose of the inquiry; and, second, it goes to the question of the reliability of this witness' statement that he knew nothing about any inquiry into the particular industries in the San Francisco Bay Area.

Mr. Nelson: First of all, Your Honor, even if it were authenticated it would still be third-hand hearsay as to what [52] the Congressman said. The best evidence is the man himself, if his testimony is to be brought——

(Testimony of William A. Wheeler.)

Mr. Edises: May it please the Court——

The Court: May be admitted, marked Defendant's Exhibit B.

Mr. Nelson: Your Honor, preserve those objections as to authenticity, hearsay, for the record?

The Court: The record is here. You can make it, Mr. Nelson.

Mr. Edises: Now, Mr. Wheeler, I show you what purports to be a clipping from the San Francisco Examiner for November 2nd, 1953, which contains a reference to yourself, William Wheeler, Committee staff investigator. See that reference? And I ask you whether you recall having conversation with Mr. Will Stevens of the San Francisco Examiner on or about the date—— A. I do.

Q. ——here indicated? A. I do.

Q. I ask you whether you are the source of the statements contained in this column. Will you look at it? A. May I read it?

Q. Yes, sure.

(Witness reading document.)

A. Would you repeat the question?

(Question read.)

The Witness: Of the three columns? [53]

Mr. Edises: Yes.

A. It was written as a result of a conversation with me. However, it is doctored up.

Q. Well, was there any other person giving information to Mr. Stevens at the time besides yourself? A. I wouldn't know.

(Testimony of William A. Wheeler.)

Q. Well, would someone know better than you, Mr. Wheeler?

A. I don't understand your question.

Q. I asked whether there was some other person at the time and place that you had your conference with Mr. Stevens.

A. No, just Mr. Stevens and I were present. He located me here and called me up.

Q. And you have indicated that the material in this story of November 2, 1953, was based on information that you gave him, is that right?

A. I am not going to state that it all was based on information I gave him.

Q. Would you please——

The Court: Now, counsel, what is the materiality of this thing? If it is material, I am willing to go into it; if it is not, I am not. What is your purpose?

Mr. Edises: Your Honor, it goes to the purpose of the Committee's inquiry.

The Court: For the purpose of impeaching this witness?

Mr. Edises: It goes—— [54]

The Court: Is it for the purpose of impeaching this witness?

Mr. Edises: Not primarily, Your Honor.

The Court: Then I don't believe it is material. If it is for his impeachment I will allow it, but if it is not, I will not admit it.

Mr. Edises: It is impeaching to this extent, that it indicates that——

(Testimony of William A. Wheeler.)

The Court: Let me see it. Do you have a copy of it?

Mr. Edises: Yes, I do. It does indicate that the witness definitely was investigating certain industries in this area.

The Court: Let me read it, please.

Mr. Edises: You will notice, No. 3, your Honor: "The Committee is interested in current infiltration among waterfront unions, * * *"

Now, the witness testified a little while ago that he had no such interest as far as the ILWU was concerned, and I will submit the Court can take judicial notice that the ILWU is a waterfront union.

The Court: This may be marked Defendant's Exhibit C, or do you desire the photostat?

Mr. Edises: I would rather have the photostat go in.

Mr. Nelson: Your Honor, I want my objection.

The Court: Just a moment, Mr. Nelson. This may be marked Defendant's Exhibit C for identification. The document which was just handed to the Court is the one read and which the [55] witness has been questioned about, and it does not appear to me this is an impeachment, and if counsel desires to make an objection to it, the objection will be sustained. Do you desire to make an objection?

Mr. Edises: May I call your Honor's attention to the item numbered 3?

The Court: I have read that.

(Testimony of William A. Wheeler.)

Mr. Edises: And is it your Honor's view that that statement is not inconsistent with the witness' statement that he was not interested in investigating the ILWU?

The Court: I think it is not inconsistent. It is not impeachment of his present testimony. It may be marked for your record, however, as Defendant's Exhibit C for identification.

Mr. Edises: I had not quite completed the identification.

The Court: All right, you may go ahead.

Q. (By Mr. Edises): Would you please indicate what items in this exhibit, Defendant's Exhibit C, do not reflect what you told Mr. Stevens at that time?

Mr. Nelson: Your Honor, may I make a brief statement at this time?

The Court: Just make the objection, counsel, if you have one to make.

Mr. Nelson: I object to it on the ground that even if it is intended for impeachment purposes, you can't impeach a witness by a statement he didn't write, he didn't sign. [56]

Mr. Edises: I don't think that is good.

The Court: I take it that the question just asked by counsel is immaterial. I looked at the document. It does not appear to be impeachment of the witness, and the objection to it has been sustained, counsel.

Mr. Edises: I simply wish to base certain questions to the witness on the material——

(Testimony of William A. Wheeler.)

The Court: I am not permitting you to go into it, and as I told you before, counsel, this investigation and the results of it were for one limited purpose and I am not going to go beyond that. There is no question pending.

Mr. Edises: I take it——

The Court: If there was an objection it is sustained.

Mr. Edises: For the record, your Honor, I wish to ask the witness certain questions based on this document that may or may not be in compliance with your ruling. I don't know.

The Court: Proceed.

Q. (By Mr. Edises): Mr. Wheeler, did you on the occasion in question make the statement to Mr. Will Stevens in substance that:

“The Velde Un-American Activities Committee hearings scheduled to begin here December 1, are being designed to ‘pull out Communism by the roots’ in the San Francisco Bay Area, * * *”

A. I did not make the statement, “pull out Communism by the [57] roots.”

Q. Did you make a similar statement?

A. I made the statement the hearings would begin here on December 1.

Q. Did you say anything about what you intended to do with Communist activities in the Bay Area?

Mr. Nelson: Objection, your Honor. That is too broad.

The Court: I take it it is immaterial, counsel.

(Testimony of William A. Wheeler.)

If it is not impeachment of it, then what he said at that time has no place in this record.

Mr. Edises: Your Honor, I think that your Honor's observations would be correct if the witness had not been put on the stand for the purpose of proving the purpose of the Committee's inquiry. Now, he apparently is the authority as far as the Government is concerned on what the purpose of this inquiry was. I can't examine Congressman Velde, because I haven't brought him here. This is the man the Government represents as the source of information upon which we can judge the pertinency of the question answered.

Now, how can I proceed to do that unless I am permitted to examine this man? If I am not permitted to go into his understanding of the pertinency, then I move to strike his entire testimony on the ground that it is demonstrated he is not qualified to testify to the purpose of the Committee's hearings in San Francisco, and I so move. [58]

The Court: It may be denied.

Mr. Edises: Make a more limited request—I move to strike the testimony of this witness with respect to the purpose of the Committee's hearings in San Francisco.

The Court: The motion may be denied.

Q. (By Mr. Edises): When you conferred with Mr. Will Stevens of the San Francisco Examiner, were you conferring with him as the representative of the Committee in this area?

(Testimony of William A. Wheeler.)

Mr. Nelson: Objection, your Honor. This is entirely beyond the scope of the direct examination. Let him make the witness his own witness for his defense case.

The Court: Sustained.

Q. (By Mr. Edises): Did you on that occasion make the statement that the Committee hoped to neutralize the value of subpoenaed witnesses to the Communist Party?

A. Not exactly that way.

Q. What did you state?

A. It is awful hard to recall—trying to do it the best I can. I believe I said the exposure of the Communist Party would neutralize the active members. The word “neutralize” is mine; I will take credit for that.

The Court: It is 12:00 o'clock, counsel, and we will take an adjournment at this time until 2:00 o'clock. The Court is waiting for the Grand Jury to come in, so the courtroom will be cleared. [59]

(Whereupon other matters were considered by the Court.)

(Whereupon an adjournment was taken until 2:00 o'clock p.m. this date.) [59-A]

October 14, 1954—2:00 P.M.

(The witness, William A. Wheeler, resumed the stand under cross-examination by Mr. Edises.)

Q. (By Mr. Edises): Mr. Wheeler, I believe that there is already in evidence Parts I and IV of

(Testimony of William A. Wheeler.)

the Committee's investigation of Communist activities in the San Francisco area, and I would like to have you, if you will, identify for us the remaining volumes in that series. I hand you a document, ask you if this appears to be Part II of the Committee's——

A. Yes, sir.

Q. ——hearings.

Mr. Edises: I would like to offer this in evidence as Defendant's Exhibit next in order.

The Court: May be marked Defendant's Exhibit D.

(Whereupon copy of transcript, Part II, referred to above, was received in evidence and marked Defendant's Exhibit D.)

Q. (By Mr. Edises): And, similarly, does this appear to be Part III of those hearings?

A. Yes, sir.

Q. And then the last is Part V. Does that appear to be Part V of the Committee's San Francisco hearings?

A. Yes, sir.

Q. And as far as you are aware, are there any other volumes [60] of this particular investigation?

A. I believe that is all that I have knowledge of.

Q. Five in all?

A. It lasted five days, and I think each volume covers each day.

Mr. Edises: I offer Part——

The Court: Part III may be marked Exhibit E and Part V may be marked Exhibit F.

(Whereupon copies of transcripts, Part III and Part V, referred to above, were marked

(Testimony of William A. Wheeler.)

respectively Defendant's Exhibits E and F and received in evidence.)

Q. (By Mr. Edises): Now, Mr. Wheeler, are you generally familiar—by the way, how long did you say you worked for the Committee on Un-American Activities? A. A little over seven years.

Q. Are you generally familiar with the publications of the Committee? A. Yes.

Q. And particularly the publications during the more recent years, say since you have been with them?

A. Yes. Well, just since I have been with them I have knowledge of.

Q. I want to ask you, if you will be good enough, to identify for us certain publications which I believe are publications of [61] the Committee. I hand you first a document which purports to be the publication, I believe, of the Committee on Un-American Activities, entitled "One Hundred Things You Should Know About Communism," ask you whether you are familiar with that publication?

A. Well, I know it was published by the Committee; I didn't have anything to do with the writing.

Q. I understand that. This appears to you to be the publication you have just said you are familiar with? A. Yes, sir.

Mr. Edises: May I have this marked for identification, your Honor? And I would like to indicate that I do not wish at this time to offer these in evidence, but merely have them identified for a subse-

(Testimony of William A. Wheeler.)

quent offer.

The Court: All right, that may be marked Exhibit G for identification. Photostatic copy of it.

Mr. Edises: Oh, I should state that I am not interested in the entire volume, which is approximately 126 pages.

The Court: Only marked for identification at this time anyway.

Mr. Edises: Yes. Very well, we will have this marked for identification, please.

(Whereupon the publication referred to above was marked Defendant's Exhibit G for identification.)

Q. (By Mr. Edises): And I show you another pamphlet which is [62] entitled, "Colonization of America's Basic Industries by the Communist Party of the U.S.A.," which apparently bears the publication date of September 3, 1954, and ask you whether you are familiar with that publication?

A. Never seen it before.

Mr. Nelson: Objection, your Honor. That is subsequent to any date involved in this matter. I think this would be completely immaterial to anything before this Court, on its face subsequent to the date of the alleged crime.

The Court: The witness said he has never seen it.

Q. (By Mr. Edises): I hand you, I show you a publication supposed to be a publication of the Committee on Un-American Activities entitled "The

(Testimony of William A. Wheeler.)

Shameful Years''; ask you if you are familiar with that?

The Court: Counsel, may I say this: You say you are not offering these at this time in evidence. I take it what you are doing is not cross-examination, even though you are identifying them. If you desire to put this witness on as part of your case some time, wouldn't that be the proper time to present these?

Mr. Edises: I will accept your Honor's suggestion if the witness be instructed to remain available for such purpose.

The Court: All right.

Mr. Edises: And I have no further questions of the witness at this time. [63]

The Court: All right.

Mr. Edises: Will the witness be instructed to remain available?

The Court: Well, you mean until what time, counsel?

Mr. Edises: Well, he would have to be available; since I understand your Honor does not wish to have me go into these matters now, I would say at least through tomorrow. I have no idea, of course, how long Government's case is going to last.

The Court: The witness should be here tomorrow, then.

The Witness: Yes, sir.

Mr. Nelson: I have just two questions, Mr. Wheeler. Strike that—make it one.

(Testimony of William A. Wheeler.)

Redirect Examination

By Mr. Nelson:

Q. With reference to the reporter who took the transcript of the hearings, which were held in San Francisco, and particularly the hearings held on December 4, 1953, are you acquainted with the home address of that reporter, that is, the locality from which that reporter came?

A. Well, her home is in Chicago.

Q. As far as you know, she came from Chicago.

Recross-Examination

By Mr. Edises:

Q. Do you know whether she is in Chicago [64] now?

A. The Committee has a contract with Hart——

Mr. Edises: Just a moment. I want to ask—object to that on the ground it is not responsive. The question is, do you know whether she is in Chicago now?

The Court: Just answer the question.

A. No, sir.

Mr. Edises: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Nelson: Your Honor, in proceedings of this type it has been the practice in the past to read into the record before the Court the entire testimony of the witness as it was given on the day in question. Now, the testimony is before you in printed

form and the only advantage that would have, as I can see, would be to put before both counsel for the defendant and your Honor before the argument on any matters of law.

The Court: I have read it, counsel; no necessity of reading it again.

Mr. Nelson: We will call Mr. Charles W. Kinsey, your Honor.

CHARLES W. KINSEY

called as a witness on behalf of the Government, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows: [65]

The Court: State your name, please.

The Witness: Charles W. Kinsey.

Direct Examination

By Mr. Nelson:

Q. What is your address, Mr. Kinsey?

A. 2004 Cambridge Drive, Alameda, California.

Q. What is your occupation?

A. Personnel director of the Oakland plant, Owens-Illinois Glass Company.

Q. How long have you been employed by the Owens-Illinois Glass Company? A. 35 years.

Q. Are you acquainted with the defendant in this action, Mr. Ole Fagerhaugh? A. I am.

Q. And is the gentleman seated in the middle of that table Mr. Fagerhaugh? A. Right.

Q. You have access to the employment records of the Owens-Illinois Glass Company in its Oakland plant? A. I do.

(Testimony of Charles W. Kinsey.)

Q. Are you familiar with the records insofar as they pertain to the defendant, Mr. Fagerhaugh?

A. Yes.

Q. Will you state when he was first employed by the Owens-Illinois Company? [66]

A. May, 1949.

Q. Will you state whether or not he was employed by the Owens-Illinois Glass Company on December 4, 1953? A. He was.

Q. In what capacity? A. Warehouseman.

Mr. Nelson: I have no further questions. You may cross-examine.

Cross-Examination

Mr. Edises: Just a few questions.

Q. Mr. Kinsey, you testified that on December 4, 1953, Mr. Fagerhaugh was in your employ. Do you know whether he was likewise working for you on October 28, 1953?

A. As far as I know, yes.

Q. And do you recall an occasion when Mr. Fagerhaugh was served with a subpoena?

A. Directly, no. I did know of it, though.

Q. In the course of your duties as personnel manager you received notice of his being served, right? A. Right.

Q. And he was served on your premises, that is, at the Owens-Illinois plant in Oakland, isn't that right? A. Yes.

Mr. Edises: I have no further questions of the witness. [67]

(Testimony of Charles W. Kinsey.)

Mr. Nelson: I have none.

The Court: That is all. Thank you.

(Witness excused.)

Mr. Edises: Could I have just a moment, your Honor? I may possibly want to call——

(Counsel leaves the courtroom.)

Mr. Edises: Your Honor, I have one question to ask of the preceding witness, and I very much dislike to ask him to return for the purpose of asking that one question. I believe that it would probably be ruled improper cross-examination, so I would like to ask the permission of the Court, therefore, to put him on as the defendant's witness for the purpose of asking that question.

The Court: All right. No objection?

Mr. Nelson: The Government is about to rest, your Honor, if that will simplify the thing.

Mr. Edises: Well, all right.

The Court: Are you resting?

Mr. Nelson: We will rest.

Mr. Edises: Very well.

CHARLES W. KINSEY

recalled to the stand, on behalf of the defendant, previously sworn. [68]

Direct Examination

By Mr. Edises:

Q. Mr. Kinsey, is the Owens-Illinois plant at Oakland under union contract with the International Longshoremen and Warehousemen's Union?

(Testimony of Charles W. Kinsey.)

A. Yes.

Mr. Nelson: I will object to that. I don't see it is relevant.

The Court: Well, I will permit it. The answer was yes?

The Witness: The answer is yes.

Q. (By Mr. Edises): For what period of years has that been true?

A. I am not sure; I believe since about 1936 or '37, that is, Oakland or the predecessor plants.

Mr. Edises: No further questions.

The Court: That is all. The witness now may be excused?

Mr. Edises: Yes.

(Witness excused.)

Mr. Edises: May it please the Court, I am somewhat taken by surprise at the early conclusion of the Government's case and I am not quite prepared to proceed with my case at this time. My case, may it please the Court, is almost entirely a documentary case. And a part of it, under the rule of the *Kasowitz* and *Alexander* cases in the Ninth Circuit, will consist of the offering of certain newspaper stories to show the general settings, the so-called background of danger of [69] possible prosecution which influenced or which had a bearing on the assertion by the witness against the privilege of self-incrimination. So I suggested to counsel earlier that we would be very happy to supply him photostatic copies of those clippings in order for him to satisfy himself as to their authenticity. However, he was

good enough to indicate that he wanted further foundation, and, of course, under those circumstances, we have got to supply the foundation. I do not have the witness presently available and will have to take steps to obtain such a witness. I think that I can probably accomplish that in the next thirty minutes. I could be mistaken, but I think I can.

The Court: You could do what in thirty minutes?

Mr. Edises: Get the witness to establish the foundation for these articles, since the Government is unwilling to stipulate.

The Court: What are you not willing to stipulate to?

Mr. Edises: The Government is unwilling to stipulate that this, for example, is a story from the San Francisco Examiner, that this is the story from the San Francisco Chronicle on the date it bears, that this is a similar story from the San Francisco Examiner, although, as I say, we have the printed stories here and photostatic copies for counsel if he cares to examine them. But they insist we have got to provide some further foundation before they will believe they are authentic, [70] so we have no other recourse.

The Court: Is that your position?

Mr. Nelson: I think that is a fair statement of our position.

The Court: Why do you take that position, counsel?

Mr. Nelson: Well, your Honor, I know of no reason that these so-called newspaper stories should be admitted without authentication to which any documentary evidence is subject. I have my doubts about their relevancy.

The Court: You have your objection as to their admissibility and their relevancy. What we are talking about now is a question of authentication, and you have a perfect right to make any proper objection at the time they are offered, but talking about merely now the authentication of the articles.

Mr. Nelson: Where the newspaper clippings themselves state the name of the newspaper and date, I will relax my objections to authentication. Where any of the newspapers have the date written in on a piece of paper to which these clippings are pasted, I must insist they be authenticated.

Mr. Edises: They all have that.

The Court: All have what?

Mr. Edises: They all have on them—they have the clippings and then on the adjoining sheet of white paper is the statement of the name of the newspaper and the date so that none of them, as far as I know, have the name of the newspaper [71] printed on them, with one or two exceptions, where we happened to have the front page; in other instances that is not available.

Now, we, as I say, have copies for counsel. We can let them have those photostats and if at any time it should be, if there is any error, certainly we would be more than happy to make any correction that is necessary. Apparently this is not sufficient, however, to counsel.

Mr. Nelson: I object, your Honor, to being placed in the position of having to verify the defendant's exhibits. If he has evidence to show, then let him do it by the rules of evidence and authenticate it; that is not our job.

The Court: I appreciate it is not your job, Mr. Nelson, but we are also anxious to expedite this proceeding and I think that both sides should take part in that expediting.

Mr. Nelson: Perhaps if your Honor gives us five minutes I will go over these clippings, see whether or not I can relax my objection to all or a substantial part of them.

The Court: How did you expect to authenticate them, bring somebody from the newspaper?

Mr. Edises: Two possibilities suggest themselves to me; one, I could bring the librarian of each of the five Bay Area newspapers. The second, the young lady who operates the clipping service, happens to be the ILWU Research Department, which made those clippings, could probably identify [72] the newspapers from which she made the clippings.

The Court: I would think you could make some investigation or examination and maybe some telephone calls that might satisfy you about the matter so that we could proceed as expeditiously as possible. I will take a recess so that you can see what you can do about it.

(Short recess.)

Mr. Nelson: May it please your Honor, we have satisfied ourselves as to these documents and we will stipulate as to their authenticity.

Mr. Edises: Thank you, counsel.

The Court: Counsel, you stated you were offering them under the theory of a certain case. What was that case?

Mr. Edises: One of them, your Honor, is Alexander versus the United States, 181 Federal 2nd 480. The mother is Kasinowitz versus the United States, 181 Federal Reporter, 2nd Series.

The Court: Second?

Mr. Edises: Second series, 632. Both are Ninth Circuit cases. The Alexander case was decided in February, 1950. The Kasinowitz case was decided in April, 1950, and the substance of those decisions, may it please the Court——

The Court: You go ahead, offer them, and I will get the case, be reading it while you are offering them, counsel.

Mr. Edises: Very well.

I offer first a story from the San Francisco Chronicle, [73] dated October 29, 1953, bearing the headline, "Un-American Probe Opens Here December 1," and in the second column the headline reading, "Red Hearing Scheduled for S.F.," and I ask leave to substitute a photostatic copy for the original.

Mr. Nelson: I wonder, counsel, if you would be good enough to state to the Court for what purpose these are offered?

The Court: Very well.

Mr. Edises: I thought I had stated that.

The Court: State it again, counsel.

Mr. Edises: The purpose is to show the exist-

ence of a background and setting such as would lead a reasonable mind to believe that answering questions asked by the Committee might lead or would possibly lead to prosecution.

In other words, it is a part of a background of danger which could lead a reasonable person to believe that he exposed himself to the possibility of prosecution should he submit to the Committee and answer their questions.

Mr. Nelson: One more question, and then I may be able to withdraw. Is there going to be any testimony or evidence, Mr. Edises, that the defendant knew of these clippings and read them?

Mr. Edises: I don't believe that there will be such because I have no present intention of having the witness take the stand, and it is my understanding that there is no necessity for showing that the witness personally knew of the particular articles in question; they merely go to show the general setting [74] and background.

I may add that there is, in these decisions, and in others which I could obtain readily for the Court, if you wish to have them, which state that the courts recognize that this is a type of proof which ordinarily would not be admissible, but they point out that to require the witness to himself have to take the stand and testify as to the reasons why he felt it necessary to assert his privilege against self-incrimination would be to defeat the very purpose of the constitutional provision which says that the witness cannot be forced to be a witness against himself,

and that is the reason that they make an exception of this type of evidence.

Mr. Nelson: Your Honor, I will admit I am not too clear in my recollection of the Alexander and the Kasinowitz cases, but it is my thought where newspapers are from a town other than the town in which the defendant lived, where there is absolutely nothing on the record to indicate he ever saw the newspaper clippings, that that failed to show anything which can be relevant to the case.

The Court: Well, suppose this were true, counsel; suppose he hadn't read them, actually, but suppose his attorney had read them and the attorney advised him by reason of the situation he should refuse to testify.

Mr. Nelson: Is there anything in the record, your Honor, that indicates the defendant knew of these clippings [75] which are offered as evidence. We deal entirely in suppositions when we put in newspaper clippings, and draw some further inference from that that the defendant had those in mind when he did certain things.

The Court: I think a lot of it goes to the weight when they don't put the witness on, but——

Mr. Nelson: Perhaps the attorney intends to take the stand and say that he saw them. Then my point is not well taken.

Mr. Edises: May I say, your Honor, as far as I am aware, the courts have treated this kind of evidence with the greatest liberality, recognizing it would be to defeat the very purpose of the privilege against self-incrimination if we were to put the

witness on the stand here and ask him what were the circumstances that led you to assert your privilege. Obviously he would have to go into everything that the privilege is supposed to protect himself against discrimination.

The Court: Is this covered in the Alexander case?

Mr. Edises: I believe this is covered in both the Alexander and——

The Court: You go ahead and offer your exhibits, and then we will have the case here to look at, counsel.

Mr. Nelson: My objection, your Honor, will be a continuing one to all of these exhibits.

The Court: All right. [76]

Mr. Edises: I offer first a Chronicle story of October 29.

The Court: Defendant's Exhibit H for identification at the moment.

(Whereupon the Chronicle story, dated October 29, 1953, referred to above, was marked Defendant's Exhibit H for identification.)

Mr. Edises: Next I offer a San Francisco Examiner story of November 2, 1953, headed, "100 Top Bay Area Reds Face Exposure in Probe." And the second portion of which is headed, "Exposure for Top S. F. Reds," and I ask leave to substitute a photostatic copy for the original.

The Court: Exhibit I for identification.

(Whereupon the S. F. Examiner story, dated November 2, 1953, referred to above, was

marked Defendant's Exhibit I for identification.)

Mr. Edises: Next I offer a story in the San Francisco Examiner, dated December 1, 1953, headed, "House Red Hearing to Open Here Today. Velde Cites ILWU," by Will Stevens. This consists of two pages, may it please the Court, and I offer the exhibit and ask leave to substitute a photostatic copy.

The Court: Exhibit J for identification.

(Whereupon Examiner story, dated December 1, 1953, referred to above, was marked Defendant's Exhibit J for identification.) [77]

Mr. Edises: Next I offer a story in the San Francisco Chronicle for December 1, 1953, entitled, "Velde Arrives," and then, "U. S. Red Hunters Open Hearing in S. F. Today."

This, likewise, consists of two pages. I had previously planned to offer the first page, but counsel for the Government wants the whole thing, so I will put in the whole thing.

May I substitute a photostatic copy for the original?

The Court: Defendant's Exhibit K for identification.

(Whereupon Chronicle story, dated December 1, 1953, referred to above, was marked Defendant's Exhibit K for identification.)

Mr. Edises: Next I offer a story in the San Francisco Call Bulletin for December 1, 1953. There is a banner headline, "Key Bridges Aide Will Defy

Velde Quiz," on the first page, and on the second page the heading is, "Velde Quiz Opens; Protests Ignored."

I asked leave to substitute a photostatic copy for the original.

The Court: Exhibit L for identification.

(Whereupon Call Bulletin Story, dated December 1, 1953, referred to above, was marked Defendant's Exhibit L for identification.)

Mr. Edises: Now, may it please the Court, I wish to enlist Mr. Wheeler's assistance here in identifying some reports of the Committee on Un-American Activities. [78]

Will you resume the stand, please?

WILLIAM A. WHEELER

resumed the stand, on behalf of the defendant, previously sworn.

The Court: You are calling him as a witness in your case?

Mr. Edises: Yes, your Honor.

Direct Examination

By Mr. Edises:

Q. Did I ask you about this pamphlet entitled, "The Shameful Years"?

A. I am very familiar with it; it is a Committee publication.

Mr. Edises: May it please the Court, I wish to offer in evidence from the document entitled "The Shameful Years, 30 Years of Soviet Espionage in the United States," a publication prepared and

(Testimony of William A. Wheeler.)

released by the Committee on Un-American Activities of the House of Representatives, the following portions: The cover page, pages 1, 2 and 3, and with the permission of the Court I should like to substitute photostatic copies for the original.

Mr. Nelson: I wonder if I might look at that before——

The Court: Yes.

Mr. Edises: Look at the whole thing.

Mr. Nelson: You offered what pages, counsel?

Mr. Edises: The cover page, 1, 2 and 3. [79]

Mr. Nelson: May I ask what the purpose of the offer is?

Mr. Edises: Yes, the purpose is to show, in general, the object of the Committee in making its various inquiries into so-called Communist infiltration or penetration of industry, the fact that in the opinion of the Committee—and I want to make it entirely clear that I am not endorsing any of the positions or conclusions taken by the Committee or stated in these publications—but that in the opinion of the Committee, the so-called Communist activities and conspiracy, which is the expression of the Committee, involves various illegal actions, including violations of federal law, and this is very, very fully documented in the numerous reports of the Committee. I do not intend to offer all, of course, but merely certain extracts from them.

Mr. Nelson: I will object to the admission of this, your Honor, or any part of it on the ground that it is a publication of another Congress, a Com-

(Testimony of William A. Wheeler.)

mittee which was under the chairmanship of another Congressman, that it is dated over two years prior to any event now before this court and is, therefore, immaterial and completely incompetent to show what counsel has offered it to show.

The Court: May I see it, please?

Mr. Edises: It is a part of this background of danger that the witness was recently permitted to take into account in deciding whether or not he should exercise his privilege not [80] to be a witness against himself.

The Court: It may be admitted and marked Exhibit M.

Mr. Edises: I am offering merely certain portions as indicated earlier. May I be permitted to substitute photostatic copies?

The Court: You may substitute photostatic copies for it. I notice that the Committee consists of some of the same persons who were present at this hearing, Jackson and some of the others I happen to see.

Mr. Nelson: That is correct, your Honor, but if one considers how far back one can go and bind the Committee by what was said by prior Congressmen——

The Court: I think that is within the discretion of the Court as to how remote they can go.

Q. (By Mr. Edises): Now, I show you, Mr. Wheeler, what purports to be the annual report of the Committee on Un-American Activities for the

(Testimony of William A. Wheeler.)

year 1953, and ask you whether you are familiar with that document?

A. I recognize this Committee publication.

The Court: Well, now, counsel, the annual report for 1953 undoubtedly did not come out until the year ended, did it not, which would be after this hearing?

Mr. Edises: Yes, and may it please the Court, it contains, and I am offering it primarily for the purpose of showing what the Committee itself regards as the purpose of its San [81] Francisco hearings. It contains a statement by the Committee as to what they were trying to get at.

(Defendant's Exhibit M was received in evidence.)

The Court: All right; I didn't know that.

Mr. Nelson: May I see the pages in question?

Mr. Edises: Yes; I am offering at this time, your Honor, the cover page, and pages 4, 5, 6 and 7. To illustrate, if your Honor is interested, the first page contains a statement as follows:

"In December, 1953, a subcommittee of the Committee on Un-American Activities held hearings in San Francisco, California, which hearings dealt in large part with the nature, scope and objectives of Communist infiltration in that vital defense area and center of West Coast communications."

The Court: All right, I get your point.

Mr. Nelson: Is this an extra copy?

Mr. Edises: Yes.

Q. I show you a document entitled "Annual Re-

(Testimony of William A. Wheeler.)

port of the Committee on Un-American Activities for the Year 1952"—

The Court: The last offer was M. The 1953 report should take Exhibit N. Is that '53?

Mr. Edises: '53.

The Witness: Yes, this is a Committee publication.

Mr. Nelson: The offer on the annual report for 1952 is objected to for the same purpose.

(Defendant's Exhibit N was received in evidence.) [82]

Mr. Edises: Yes, but I haven't offered it yet.

Mr. Nelson: Oh.

Mr. Edises: I now offer in evidence, may it please the Court, the document just identified by the witness, being the annual report of the Committee on Un-American Activities for the year 1952, and, specifically, the cover page and the following pages, 5, 7, 8, 34 and 35. They are offered again for the same purpose indicated previously.

The Court: Marked Exhibit O.

(Whereupon the 1953 Annual Report and the 1952 Annual Report, referred to above, were received in evidence and marked, respectively, Defendant's Exhibits N and O.)

Q. (By Mr. Edises): Now, I hand you a document entitled "Annual Report of the Committee on Un-American Activities for the Year 1951," which was released on February 17, 1952, and ask you if you can identify this document?

(Testimony of William A. Wheeler.)

A. Yes, this is—I identify it as a Committee publication.

Mr. Edises: I should like to offer in evidence, if the Court please, the cover page and two pages from that document, pages 14 and 15.

Mr. Nelson: Your Honor, I will again renew my objection to the document from the preceding Congress which is over two years away from the times in question.

Mr. Edises: May it please the Court, none of this is [83] offered for the purpose of proving the truth of anything contained therein. It is merely offered for the purpose of showing the kind of setting in which the witness has asserted his privilege.

The Court: I will admit this, counsel, but I believe—I don't know what your purpose is, but I believe any offer of any report prior to that——

Mr. Edises: Only going back one more year.

The Court: Considerably remote.

Mr. Edises: I offer this in evidence.

The Court: I ruled upon that exhibit as being remote, putting in three years now, and I think anything beyond that would be remote, but you may offer it. 1951 may be Exhibit P.

(Whereupon the 1951 Annual Report, referred to above, was received in evidence and marked Defendant's Exhibit P.)

Q. (By Mr. Edises): Now, I show you a document entitled "Annual Report of the Committee on Un-American Activities for the year 1950," and ask you if you are able to identify that document?

(Testimony of William A. Wheeler.)

A. It is an official Committee publication.

Mr. Edises: Now, may it please the Court, I would like to indicate the special particular purpose for which I offer this document, or, rather, portions of it. The 1950 Report of the Un-American Activities Committee contains perhaps the most [84] extensive discussion of the ILWU, the union at the Owens-Illinois plant, the union to which Mr. Fagerhaugh belongs. And it purports to discover all sorts of nefarious activities of the ILWU, many of which I have no hesitation in stating I regard as completely fabricated and slanderous. Nevertheless, they are part of the background which any member, any person who is an active trade unionist would have to take into consideration in venturing to appear before this Committee investigating matters of the kind which it purported to be investigating in San Francisco. For that reason I submit it is relevant.

Mr. Nelson: I will object to it on the ground that it is not only remote, but there is no testimony in the record with regard to whether or not the defendant was a member of that union or with regard to that union being specifically involved in the subjects of the inquiry.

Mr. Edises: It is certainly clearly inferable, may it please the Court, from the articles in evidence, from the testimony—the testimony indicates he was a warehouseman—and from the testimony of Mr. Kinsey that the Owens-Illinois plant was organized by the ILWU.

The Court: I believe it is remote, counsel, but

(Testimony of William A. Wheeler.)

you say this is the last one you are going to offer, why, I will admit it.

Mr. Edises: May I be permitted to substitute a photostatic [85] copy, your Honor?

The Court: All right. All of it?

Mr. Edises: No, I thought I read the pages that I was interested in.

The Court: I don't think so.

Mr. Edises: I wish to offer the cover page, pages 16, 17, 18, 31 and 32. I have attempted to select only those portions which referred to the ILWU.

The Court: Exhibit Q.

(Whereupon the 1950 Annual Report, referred to above, was received in evidence and marked Defendant's Exhibit Q.)

Mr. Edises: Now, may it please the Court, the witness was unable to identify a document which I have here entitled, "Colonization of America's Basic Industries," which purports to be an examination of the purpose for which the Communist Party is alleged to desire to organize industry. I feel that it has a definite bearing on the propriety of the witness' assertion of his privilege against self-incrimination, because it is an official expression of the view that persons who are identified as Communists have as their objectives certain violations of federal law, which have a bearing on the assertion of privilege.

The witness cannot identify them, but the documents themselves bear the official seal of the United States. They [86] state on their face that they are

(Testimony of William A. Wheeler.)

publications of the Committee and they indicate that they are such official publications. I believe that the present rule is that there is a *prima facie* case of authenticity established by virtue of the fact that the document purports to be an official Government publication, and under those conditions I believe that the burden is on the Government to establish that the document is not authentic.

Mr. Nelson: Rather than go into the question of authenticity, I will ask counsel if there is a specific reference in here to either the San Francisco hearings or to the defendant?

Mr. Edises: No, there is no reference to the defendant or to the San Francisco hearings.

Mr. Nelson: I call your Honor's attention to the fact that it is dated ten months after the date of the crime alleged in the indictment and therefore could hardly have a bearing on the setting on which the defendant answered the question.

Mr. Edises: No, but it does have a bearing on the question of the danger which this witness would be exposed to.

Mr. Nelson: That danger could be relevant only at the time.

Mr. Edises: Wait a minute.

Mr. Nelson: Excuse me. [87]

Mr. Edises: No, it goes into what the Committee regards as its objectives in calling these witnesses and questioning them with regard to their activities.

The Court: Ten months after this occasion.

(Testimony of William A. Wheeler.)

Mr. Edises: The publication date was, that is true, but the material that is referred to all antedated the date of the hearings. There is nothing in here that refers to any time subsequent to the time of the hearings, and it purports to be a recapitulation of the previous findings of the Committee, all of which antedated the hearings in this case.

Mr. Nelson: Now, since counsel has made quite an extensive identification of this—of course, he is not under oath, or the document is not a certified copy. I will still state to your Honor it is entirely too remote to be admissible for the purpose offered.

Mr. Edises: May I say this, your Honor: It is the most direct expression I was able to find in the literature, of the voluminous literature put out by the House Un-American Activities Committee as to what they deem to be the type of activity carried on, allegedly, in industry, by so-called Communists, or the Communist Party.

The Court: How could that affect in any way the action of the defendant at the time, in December, 1953?

Mr. Edises: The pamphlet itself, I grant, could not, but the views expressed therein indicate what the Committee [88] regarded as the relevance or significance of their inquiries.

The Court: I am inclined to think the objection is good, counsel. You may mark it for identification.

Mr. Edises: I would like it marked for identification.

(Testimony of William A. Wheeler.)

The Court: R for identification.

(Whereupon the document entitled, "Colonization of America's Basic Industries," referred to above, was marked Defendant's Exhibit R for identification.)

Mr. Edises: I would like to offer it in evidence.

The Court: The objection may be—if there is an objection?

Mr. Nelson: There is an objection.

The Court: It may be sustained.

Mr. Edises: Can I be permitted to substitute a photostatic copy, your Honor?

The Court: That's all right.

Mr. Edises: And I don't know if the record indicated it, but I am offering only pages 13, 14, 15 and the cover page; and again I want the record to show that neither the—counsel in this case does not by any offer purport to endorse any of the contents——

The Court: You stated that already.

Mr. Edises: Your Honor, may I be permitted to withdraw Defendant's Exhibit G and to substitute a photostatic copy of the following pages: The cover page, pages 67, 76, 78, 80, 81, [89] 82, 84 and 87. That is the document entitled "100 Things You Should Know About Communism."

Mr. Nelson: That is still for identification only, I understand.

Mr. Edises: That, I believe, was admitted, wasn't it?

The Court: I have it marked for identification. That, wasn't it, however, prior to Kinsey?

(Testimony of William A. Wheeler.)

Mr. Edises: I would like to offer these pages in evidence.

The Court: This is on what date of this book?

Mr. Edises: May 14, 1951.

The Court: May I see it?

It may be admitted in evidence.

(Whereupon portions of Defendant's Exhibit G, formerly marked for identification, were received in evidence.)

Mr. Edises: At this time, may it please the Court, I wish to offer in evidence several pages from the Congressional Record, specifically the Congressional Record for May 11, 1954. The portions that I am offering, your Honor, are the debate which went on on the floor of the House of Representatives at the time that the citation of Mr. Fagerhaugh for contempt of Congress was voted, and particularly the statement of Mr. Jackson of the Committee as to the pertinency of the questions asked of Mr. Fagerhaugh.

The Court: That is in the file, isn't it? [90]

Mr. Edises: I believe——

Mr. Nelson: Attached to an affidavit which accompanied a pre-trial motion.

Mr. Edises: But at that time it was merely copied out, typewritten. I would like to offer a photostatic copy, if I may, of the original.

The Court: May be marked Exhibit S.

(Whereupon portions of Congressional Record, referred to above, were received in evidence and marked Defendant's Exhibit S.)

(Testimony of William A. Wheeler.)

Mr. Edises: Now, may it please the Court, when counsel offered Volumes I and IV of the Committee's San Francisco hearings, I believe his offer was limited to certain pages. I now wish to offer the remainder of these volumes.

Mr. Nelson: To perhaps save your Honor some difficulty, we will be happy to stipulate that the limitation on our offer may be withdrawn. In other words, rather than have two sets of exhibits here, one offer has clips around certain pages and others which do not—I will withdraw our offer and offer the entire volume in each case——

The Court: All right.

Mr. Nelson: ——if that is satisfactory.

Mr. Edises: Satisfactory.

The Court: Then the entire volume, I think Exhibit 7 is Part I and Exhibit 8 is Part IV, all of it may be admitted. [91]

(Whereupon the entire transcript, Part I and Part IV, were received in evidence and marked Plaintiff's Exhibits 7 and 8, respectively.)

Mr. Edises: May I inquire of the Clerk as to whether I now have in evidence all five volumes of the——

The Clerk: Yes.

The Court: Yes.

Mr. Edises: ——of the hearings.

The Court: All in evidence. Have you any further need for this witness?

Mr. Edises: Could I confer with my associate for just a moment, your Honor?

(Testimony of William A. Wheeler.)

Q. Mr. Witness, do you know whether the hearings in San Francisco were open to the public?

A. They were open to the public, yes.

Q. And do you know whether they were attended by newspaper reporters, various newspapers?

A. They were.

Q. And the press services?

A. They were.

Q. And they were widely reported in the press, isn't that true?

A. The coverage was good.

Q. Were there any radio broadcasts pertaining to the hearings?

Mr. Nelson: Your Honor, I will have to object to that [92] unless he can point out the materiality.

Mr. Edises: The cases have indicated, your Honor, that the question of publicity of these hearings is a material factor relating to the witness' reasonable fear that whatever he says there may lead to prosecution.

The Court: I will permit the answer. What do you mean by broadcast? You mean hearings actually broadcast themselves, or reports of them?

Mr. Edises: I was going to ask more specifically that question.

Q. Was there any broadcasting of the actual testimony itself?

A. Yes, sir.

Q. There was?

A. Yes, sir.

Q. And in addition, of course, there were radio news stories of the hearings, is that right?

Mr. Nelson: Objection, your Honor. He is on direct examination; those are leading questions.

(Testimony of William A. Wheeler.)

The Court: They are, but I will permit it.

A. Yes, sir.

Mr. Edises: No further questions of this witness, your Honor.

The Court: That is all, Mr. Wheeler. Thank you. You may now be excused, not required to be here tomorrow.

(Witness excused.) [93]

Mr. Edises: Your Honor, I believe that that will complete the defendant's case. I would like the privilege of conferring for about five minutes with my associate and in checking my notes in order to determine if there is anything further I wish to offer.

The Court: All right, take a recess for a few minutes.

(Short recess.)

Mr. Edises: At this time, may it please the Court, I wish to renew my motion to strike the testimony of Mr. Fagerhaugh appearing in Part IV of, rather, appearing in Plaintiff's Exhibit No. 8 at pages 3367 to 3371 on the grounds previously indicated. Your Honor will recall that you reserved ruling on that.

Mr. Nelson: The citations previously given to your Honor of the rule of criminal procedure which provides for the admission of official records of the United States Government, by incorporating the rules in such cases we feel adequately cover the case. Section 1773 of Title 28, United States Code, says

that the record is admissible to prove what happened, and there is no contention this is not a certified copy of a public official record.

The Court: The motion to strike may be denied.

Mr. Edises: May it please the Court, the defendant has no further evidence to offer at this time.

The Court: Government rests? [94]

Mr. Nelson: The Government has nothing, your Honor.

Mr. Edises: Your Honor, we wish to argue a motion to acquit, but I would like to ask the Court to put that over to a later date, preferably at a time when it could be combined with a presentation to the Court of such law as we have been able to find with respect to the offer of the defendant to purge. Whatever time would be satisfactory with your Honor would be agreeable to us.

The Court: Do you not think the whole matter might be better handled by written briefs?

Mr. Edises: It probably could, except that oral argument, of course, does give the opportunity of responding to the arguments of the other side, unless you wanted to have consecutive briefs.

The Court: Well, suppose we do it this way: Suppose the briefs be filed and after they are filed, then if counsel upon either side desires to have the matter set down for oral argument after the written briefs are in, we can see if that can't be arranged.

Mr. Edises: That is satisfactory to us.

Mr. Nelson: May I say this, your Honor: Previously a motion to dismiss was filed and six of the

seven grounds of that motion were postponed for decision to the conclusion of the trial.

The Court: I recall. [95]

Mr. Nelson: The Government did not file a reply brief to the six grounds, meeting them on the merits; merely filed a brief saying they should be postponed at this time until it has filed a reply to the six grounds to the motion to dismiss which I anticipate will meet a number of the grounds on the motion for acquittal, and ask leave to reply to whatever brief is filed on the motion for acquittal.

The Court: Do you have the brief prepared now?

Mr. Nelson: Yes, your Honor.

The Court: Well, this will be the first—I take it counsel for the defendant will file a brief, then upon the motion to acquit, which will also cover the motion to dismiss that has been made before another judge——

Mr. Edises: Yes, I presume, your Honor, it would not be necessary to formally renew the motion to dismiss at this time.

The Court: That's right.

Mr. Edises: But I shall cover both the matters brought in for the first time at the trial, and also the matters covered in the motion to dismiss.

The Court: And also upon your motion to purge the contempt, that will be included.

Mr. Edises: Yes.

The Court: How long do you desire?

Mr. Edises: Would one week be agreeable to your Honor?

The Court: Any time you want. [96]

Mr. Edises: I think my schedule——

The Court: Ten days?

Mr. Edises: Ten days probably would be the safer date; take us a week from Monday.

Mr. Nelson: Did I understand your Honor that his brief will be a reply to the one I have handed, and we will file a closing brief, or is your brief to be an opening brief?

Mr. Edises: In a sense it has both functions.

The Court: Of course, I haven't seen this brief that is here. Well, let us leave it this way. You file a brief in ten days.

How long do you desire to reply?

Mr. Edises: A week.

The Court: Ten days?

Mr. Nelson: Very well.

Mr. Edises: I suppose we may have the opportunity or privilege of requesting time to answer in the event that there are any new matters brought in?

The Court: All right. This is October 15.

The Clerk: October 25, your Honor, and November 4?

The Court: Well, I will continue it on my calendar until November 19 at 9:30 for submission if the briefs are then on file and if we haven't heard any motion by either side in the meantime for further briefs. November 19th, at 9:30. The Court is in recess. [97]

Mr. Edises: Your Honor, may the present bail be continued?

The Court: Yes. [97-A]

ment, which declares in part that no person shall be compelled in any criminal case to be a witness against himself.

The privilege afforded extends not only to answers that would in themselves support a criminal prosecution under a federal criminal statute, but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute the claimant for a federal offense. The cases hold that this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The cases hold that the entire setting must be taken into consideration in determining whether the constitutional guaranty is validly invoked.

In the present case I have examined the transcript of the evidence before the Committee, have heard the evidence in this case, and have read the briefs filed by counsel. It is apparent to the Court that in this matter the defendant could not possibly have any fear of prosecution by his answering the question as to where he was employed.

At the time of the hearing the defendant himself stated that one reason why he refused to answer the question was "because the Committee is fully aware of where I am employed and I don't see any purpose." Later the defendant again said, [100] when asked about his place of employment, "I am not going to be a party to dragging my employer into this smear campaign."

Again, later, he was asked, "Are you employed at the Illinois Glass Company, so that the record

will state it correctly," and the defendant again refused to answer the question upon the same ground.

Under all the circumstances of the case I am satisfied that the defendant had no reasonable cause to apprehend danger from a direct answer to the question. In fact, the defendant himself at the hearing stated that he did not believe that the answer would incriminate him.

The Court believes that his failure to answer the question, and to answer a pertinent question, was wilful and contemptuous.

There is another matter to be determined, and that is whether the offer of the defendant at the start of this case to answer the question previously addressed to him by the Committee purged the contempt. Counsel has presented to me no cases or law indicating that a contempt such as we have in this matter can thus be purged, and the Court finds that it cannot be so purged.

Therefore, the Court finds the defendant guilty of the charge set forth in the indictment.

Mr. Edises: Your Honor, may I request that execution be stayed for a period of, I would say, ten days? [101]

The Court: That what be stayed?

Mr. Edises: The imposition of—well, what I am concerned about is that the existing bail be continued and we be given opportunity to make whatever motions or take whatever action we feel appropriate.

The Court: The matter is on for sentence at this time.

Mr. Edises: I beg your pardon?

The Court: The matter is before me now for sentence.

Mr. Nelson: I think the motion is premature, your Honor.

Mr. Edises: Well, perhaps you are right about that. I will renew it.

Mr. Nelson: May I move at this time that your Honor pass sentence, if you are ready to do so?

The Court: The Court is about to impose sentence. Is there anything you desire to offer prior to sentence?

Mr. Edises: No legal matters at this time, your Honor.

The Court: The defendant having been convicted of the charge set forth in the information, to wit, a violation of Section 192 of Title 2 of the United States Code, it is the judgment of the Court that he be imprisoned in an institution to be selected by the Attorney General for a period of one month, and that he pay a fine in the sum of \$100.00.

Mr. Edises: Now, may I request that the execution of sentence be stayed for a reasonable time, your Honor?

The Court: Of what? [102]

Mr. Edises: I would say ten days, if that is agreeable.

The Court: I am perfectly willing to stay the execution of the sentence, but I wonder whether ten days is a proper time.

Mr. Edises: Well, five days would be sufficient.

The Court: Well, let's make it a week. Today is the 10th. Say the 17th?

Mr. Edises: That is satisfactory.

The Court: December 17th at 10:00 a.m.

Mr. Edises: May the defendant be continued at liberty upon his present bail?

The Court: He may remain on his present bail.

Certificate of Reporter

We, Official Reporters and Official Reporters pro tem, certify that the foregoing transcript of 103 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ KENNETH J. PECK,

/s/ R. D. NORTON.

[Endorsed]: Filed January 24, 1955. [103]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein:

Indictment.

Minutes of arraignment, dated July 26, 1954.

Defendant's motion to dismiss the indictment with exhibits attached.

Plaintiff's motion to strike.

Minutes of September 14, 1954.

Order, filed September 17, 1954.

Minutes of plea, dated September 28, 1954.

Waiver of jury trial.

Minutes of December 10, 1954.

Notice of appeal.

Judgment and commitment.

Stay of execution of sentence.

1 Volume of Reporter's Transcript.

Plaintiff's Exhibits Nos. 1 through 8, inclusive.

Defendant's Exhibits A through S, inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 25th day of January, 1955.

[Seal]

C. W. CALBREATH,

Clerk;

By /s/ WM. C. ROBB,

Deputy Clerk.

[Endorsed]: No. 14638. United States Court of Appeals for the Ninth Circuit. Ole Fagerhaugh, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 25, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

The United States Court of Appeals
for the Ninth Circuit

No. 14638

At a Stated Term, to wit: The October Term, 1954,
of the United States Court of Appeals for the
Ninth Circuit, held in the Courtroom thereof,
in the City and County of San Francisco, in
the State of California, on Monday, the twenty-
seventh day of December, in the year of our
Lord one thousand nine hundred and fifty-
four.

Present: Honorable William Denman, Chief Judge,
Presiding;

Honorable Homer T. Bone, Circuit Judge;

Honorable William E. Orr, Circuit Judge.

OLE FAGERHAUGH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER SUBMITTING AND GRANTING
MOTION FOR ADMISSION TO BAIL

Ordered motion of appellant for admission to bail
presented by Mr. Bertram Edises, counsel for ap-
pellant, and by Mr. Richard C. Nelson, Assistant
United States Attorney, counsel for appellee, and
submitted to the court for consideration and deci-
sion.

On consideration whereof, it is now here ordered by this court that appellant be admitted to bail in the amount of Five Hundred Dollars (\$500.00), cash or bond, the bail to be conditioned as required by law, and to be approved by the United States Attorney and the District Judge of the Northern District of California, and filed with the clerk of said District Court.

[Title of Court of Appeals and Cause.]

No. 14,638

STATEMENT OF POINTS ON WHICH
APPELLANT RELIES

1. The court below erred in holding that a witness who had been charged under oath with being a leading Communist trade unionist was not justified in invoking the self-incrimination clause of the Fifth Amendment when asked where he is employed.

2. The court below erred in holding, in effect, that the privilege against self-incrimination may not be invoked by a witness who avows he is guilty of no crime.

3. The court below erred in holding that a witness who is charged with contempt of a Congressional subcommittee for refusing to answer a question may not purge the contempt by offering to answer the question in open court, or wherever and whenever the subcommittee may request.

4. The court below erred in holding a witness to be in contempt for refusing to answer a question asked by a Congressional subcommittee, where the evidence shows conclusively that the subcommittee was fully and officially aware of the answer, and asked the question for the purpose of harassing the witness and subjecting him to extralegal punishment by bringing about loss of his employment.

5. The court below erred in adjudging the appellant guilty of contempt of Congress on the basis of an incomplete and incorrect and unauthenticated transcript of the record of the testimony purporting to demonstrate the contempt.

6. The court below erred in invading the appellant's right to privacy regarding his personal affairs.

7. The Congressional subcommittee was acting in excess of and beyond its powers, and with respect to a matter not pertinent to any legitimate subject of inquiry.

8. The Congressional subcommittee sought to abridge the appellant's right of free speech.

Respectfully submitted,

EDISES, TREUHAFT,
GROSSMAN & GROGAN,

By /s/ BERTRAM EDISES,
Attorneys for Appellant.

[Endorsed]: Filed January 25, 1955.

No. 14,638

IN THE

United States Court of Appeals

For the Ninth Circuit

OLE FAGERHAUGH,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,

United States Attorney,

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FILED

SEP 21 1955

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Jurisdiction	1
Statute	1
Statement of the Case.....	2
Questions Presented	6
Summary of Argument	6
Argument	8
I. Appellant was not entitled to the privilege.....	8
II. Appellant was directed to answer the question.....	14
III. Appellant waived the privilege.....	17
Conclusion	21

Table of Authorities Cited

Cases	Pages
Bart v. United States, 349 U.S. 219.....	15, 16
Blau v. United States, 340 U.S. 159.....	8
Brown v. Walker, 161 U.S. 591.....	9
Camarota v. United States, 111 F.2d 243.....	9, 10
Counselman v. Hitchcock, 142 U.S. 547.....	9
Emspak v. United States, 349 U.S. 190.....	15, 16, 21
Graham v. United States (9th Cir.), 99 F.2d 746.....	14
Hoffman v. United States, 341 U.S. 479.....	8
In re Willie, F. Cas. No. 14692e.....	9
Mason v. United States, 244 U.S. 362.....	8
Miller v. United States (9th Cir.), 95 F.2d 492.....	8
Quinn v. United States, 349 U.S. 155.....	7, 15, 16, 21
Rogers v. United States, 340 U.S. 367.....	8, 17, 18, 19, 20
United States v. Cusson, 132 F.2d 413.....	9
United States v. Rosen, 174 F.2d 187.....	9, 12
United States v. Weisman, 111 F.2d 260.....	9, 10, 12
United States v. Zwillman, 108 F.2d 802.....	9

Acts

Smith Act	10, 11
-----------------	--------

Constitutions

United States Constitution, Fifth Amendment	18
---	----

Rules

Rule 37(a), Federal Rules of Criminal Procedure.....	1
--	---

Statutes

Title 2, United States Code, Section 192.....	1, 3
Title 28, United States Code, Section 1291.....	1

No. 14,638

IN THE

United States Court of Appeals

For the Ninth Circuit

OLE FAGERHAUGH,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 1291 of Title 28 United States Code, Section 192 of Title 2 United States Code and Rule 37 (a) of the Federal Rules of Criminal Procedure.

STATUTE.

2 *United States Code*, Section 192.

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either

House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisoned in a common jail for not less than one month nor more than twelve months.

STATEMENT OF THE CASE.

On December 4, 1953 appellant testified before a sub-committee of the House Committee on Un-American Activities at San Francisco, California. (Tr. 40.) Appellant was asked what his present employment was and replied, "I am a warehouseman." (Exhibit 8.) The next question asked appellant was, "Where are you employed?"¹ (Exhibit 8.) Appellant refused to answer this question. (Exhibit 8.) Appellant declared he had legal reasons for refusing to answer the question. (Exhibit 8.) He said he was "not going to be a party to dragging my employer into this smear campaign". (Exhibit 8.) He informed the Committee he was going to continue to stand on his right not to answer the question. (Exhibit 8.) He stated that since the Committee was fully aware as to where he was employed he didn't see any purpose in answering the question. (Exhibit 8.) Appellant was

¹The transcript (Exhibit 8) of the Committee hearing, insofar as pertinent here, is included in the appendix to appellant's brief.

then directed to answer the question. (Exhibit 8.) Thereafter, he stated that he did not feel that the answer to the question or any answer he might give at the hearing might incriminate him. (Exhibit 8.)

Representative Jackson, in the House of Representatives debate on the resolution to cite appellant for contempt, indicated that the Committee felt that the answer to the question of appellant's place of employment was pertinent for proper identification and to determine where Communist Party members were placed in industry throughout the country. (Exhibit 7; Tr. 24.)

In the report of the Committee on Un-American Activities it was submitted that appellant refused to answer a question pertinent to the subject under inquiry by a sub-committee of the Committee on Un-American Activities and that his refusal to answer the question deprived the Committee of necessary and pertinent testimony and placed the witness in contempt of the House of Representatives of the United States. (Exhibit 7; Tr. 22.) The Speaker of the House of Representatives certified this report to the United States Attorney for proceedings against appellant in the manner and form provided by law. (Exhibit 7; Tr. 22.)

On July 15, 1954 appellant was indicted for a violation of Section 192 of Title 2 United States Code for refusing to answer the question where he was then employed. (Tr. 3, 4.) Appellant's motion to dismiss the indictment was denied by United States District Judge Edward P. Murphy. (Tr. 30.) On October

14, 1954, after waiver of a jury trial, appellant was tried by the Court, the Honorable O. D. Hamlin presiding. (Tr. 33.) After evidence was introduced on the part of the government and appellant, the Court found the appellant guilty stating as follows (Tr. 125-127):

“The defendant in this case is charged with having refused to answer a pertinent question before a duly created subcommittee of the Committee Upon Un-American Activities of the House of Representatives of the United States.

The question asked of the defendant was, ‘Where are you employed?’. The defendant based his refusal to answer this question upon the Fifth Amendment, which declares in part that no person shall be compelled in any criminal case to be a witness against himself.

The privilege afforded extends not only to answers that would in themselves support a criminal prosecution under a federal criminal statute, but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute the claimant for a federal offense. The cases hold that this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The cases hold that the entire setting must be taken into consideration in determining whether the constitutional guaranty is validly invoked.

In the present case I have examined the transcript of the evidence before the Committee, have heard the evidence in this case, and have read the briefs filed by counsel. It is apparent to the

Court that in this matter the defendant could not possibly have any fear of prosecution by his answering the question as to where he was employed.

At the time of the hearing the defendant himself stated that one reason why he refused to answer the question was 'because the Committee is fully aware of where I am employed and I don't see any purpose.' Later the defendant again said, when asked about his place of employment, 'I am not going to be a party to dragging my employer into this smear campaign.'

Again, later, he was asked, 'Are you employed at the Illinois Glass Company, so that the record will state it correctly,' and the defendant again refused to answer the question upon the same ground.

Under all the circumstances of the case I am satisfied that the defendant had no reasonable cause to apprehend danger from a direct answer to the question. In fact, the defendant himself at the hearing stated that he did not believe that the answer would incriminate him.

The Court believes that his failure to answer the question, and to answer a pertinent question, was wilful and contemptuous.

There is another matter to be determined, and that is whether the offer of the defendant at the start of this case to answer the question previously addressed to him by the Committee purged the contempt. Counsel has presented to me no cases or law indicating that a contempt such as we have in this matter can thus be purged, and the Court finds that it cannot be so purged.

Therefore, the Court finds the defendant guilty of the charge set forth in the indictment."

Appeal was timely made to this Court. (Tr. 32.)

QUESTIONS PRESENTED.

1. Was appellant entitled to the privilege?
 2. Was appellant directed to answer the question?
 3. Did appellant waive any right to the privilege?
-

SUMMARY OF ARGUMENT.

I. APPELLANT WAS NOT ENTITLED TO THE PRIVILEGE.

A witness' say-so does not of itself establish the hazard of incrimination. It is not enough that answers to anticipated later questions might incriminate.

Here, the question asked was innocent on its face. The burden was on appellant to come forward with some sort of showing that the answer might incriminate him. This he did not do. All he claimed was that the answer might involve a third person and that he didn't see any purpose to the Committee's question since they already knew the answer. Furthermore, he himself declared that he didn't feel that the answer might incriminate him. The uncontradicted evidence was that appellant wilfully and contemptuously refused to answer the question and claimed the privilege against self-incrimination in bad faith.

II. APPELLANT WAS DIRECTED TO ANSWER THE QUESTION.

After being asked the question "Where are you employed?", appellant gave various reasons for refusing to answer. He claimed that he had a legal right not to answer, and said that he was going to stand on that right.

Quinn v. United States, 349 U.S. 155, holds that if objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected by the committee.

Under the recent decisions of the Supreme Court the Committee was required to interpret appellant's rather vague language in favor of the privilege. Appellant thereafter was specifically directed to answer the question. In the cases recently decided by the Supreme Court this direction to answer was not present. There is no evidence in the record that appellant was under any misapprehension as to the disposition of his objection by the Committee. In the absence of any showing by appellant, this Court should not so find now.

III. APPELLANT WAIVED THE PRIVILEGE.

Appellant claimed the privilege against self-incrimination after first answering questions concerning the nature of his employment. He may not select his own stopping place in the testimony. After testifying to a portion of the facts concerning his

employment, he cannot decide to withhold those facts he feels might embarrass third parties unless some showing is made that the answers to the questions might involve different consideration than the one he has already given. No such showing is made here. The claim of privilege was a pure afterthought. It was made only after appellant disclosed his real reasons for declining to answer. This reason was untenable. This case is indistinguishable from the case of *Rogers v. United States*, 340 U.S. 367. Here, as there, appellant has waived any right to the privilege.

ARGUMENT.

I. APPELLANT WAS NOT ENTITLED TO THE PRIVILEGE.

The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. *Hoffman v. United States*, 341 U.S. 479, 486; *Miller v. United States* (9th Cir.), 95 F. 2d 492. To support the claim of privilege the danger must be real, not remote or fanciful. It must appear that an answer to a question may disclose a fact which will supply a link in the chain of evidence which is necessary to establish the commission of a crime by the witness. *Mason v. United States*, 244 U.S. 362; *Blau v. United States*, 340 U.S. 159; *Hoffman v. United States*, supra. The witness must have reasonable cause to apprehend danger from a direct answer. *Mason v. United States*, supra; *Hoffman v. United States*, supra. When ques-

tions do not on their face appear to call for an answer which would tend to incriminate, it is incumbent upon the witness to justify his refusal to answer on the ground claimed by making it appear that his assertion that the answer would tend to incriminate was based upon substantial reasons so to believe and was not made to merely protect some other person or persons. *United States v. Rosen*, 174 F. 2d 187, 188; *Counselman v. Hitchcock*, 142 U.S. 547; *Brown v. Walker*, 161 U.S. 591; *United States v. Zwillman*, 108 F. 2d 802; *United States v. Weisman*, 111 F. 2d 260; *United States v. Cusson*, 132 F. 2d 413. It is not enough that answers to anticipated later questions might incriminate. *Camarota v. United States*, 111 F. 2d 243.

It may be argued that if the witness is required to show how the answer might incriminate him the privilege would be destroyed. On the other hand, if a mere claim by a witness of the privilege is sufficient, the government will be denied relevant evidence in cases where a refusal to answer the question was based not on a real fear of incrimination but out of contempt of the tribunal or a desire to protect others. As Chief Justice Marshall said in the *Burr* treason case (*In re Willie*, F. Cas. No. 14692e), "When two principles come in conflict with each other, the Court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can

neither of them be entirely disregarded.” The only practical solution is to be content with the door’s being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available. *United States v. Weisman*, 111 F. 2d 261.

A. The question was innocent on its face.

It is, of course, possible to conceive of instances where an answer to the question “Where are you employed?” would in fact be incriminating. The question here, however, must be examined in its setting. Appellant was a warehouseman at the Illinois Glass Company. He was aware that the committee knew of his place of work. His employer testified at the trial that he was that which he claimed at the hearing—a warehouseman—no more and no less. Appellant, immediately before refusing to answer the question, stated the nature of his employment, and any inference of an illegal business is not in the case. Appellant himself stated the real reason for his refusal to answer, declaring that he was not going to drag his employer into the hearing, and that he did not see the purpose to the question. Appellant argues that the answer to the question might subject appellant to prosecution under the Smith Act. He infers this danger from the fact that the House Committee was investigating Communist activities and particularly Communist infiltration into industry. He chooses to neglect the avowed purpose of the Committee which was to inquire into the possibility

of *enacting* legislation for the purpose of protecting industry from Communist infiltration. Any prosecution which might be instituted on the basis of future legislation enacted pursuant to recommendation of this Committee would be, as far as appellant's present activities are concerned, barred as "ex post facto".

The Smith Act, as it presently reads, has nothing to do with employment as such. Appellant might very well have advocated the overthrow of the government of the United States by force. The fact he worked in a glass factory, however, could not conceivably be a link in the chain of evidence of a successful prosecution for this crime. Appellant has contented himself with merely listing all the statutes he could discover which involve subversion or Communist activities. It must be remembered that appellant was not employed in the making of atomic bombs. He was in fact a warehouseman, and it appeared to the Committee through his own testimony that he was merely a warehouseman. Any assumption that appellant could reasonably apprehend danger from the question here asked would be based on speculation and conjecture.

The government does not need to argue that appellant in fact was not a subversive. Perhaps he was and is. The answer to the question here, however, would not furnish evidence or leads to prove that fact. As stated before, the fact that answer to anticipated later questions might incriminate is not sufficient to excuse a refusal to answer innocent questions. *Camarota v. United States*, *supra*.

When appellant was asked concerning his Communist activities and associates, he had a right to refuse to answer the question, but when he was asked questions for the purpose of identifying himself for the record, he had no such right. There was ample evidence for the Court below to conclude that the question asked in light of its setting could not reasonably have tended to incriminate appellant.

B. Appellant did not justify his refusal to answer.

Since the question was innocent on its face, the burden was on appellant to come forward with some sort of showing that the answer might incriminate him. *United States v. Weisman*, supra; *United States v. Rosen*, supra. Appellant need not have proved this fact by a preponderance of evidence or beyond a reasonable doubt. However, he was required to make some showing to give at least a clue from which a reasonable man could gain some inkling of a reasonable danger that was not fanciful, conjectural or speculative. At the hearing he mentioned a number of reasons why, in his opinion, an answer could not be required. He stated, "... the committee is already fully aware of where I am employed, and I don't see any purpose" He stated, "I am not going to be a party to dragging my employer into this smear campaign." He stated, "I don't feel that that answer or any answer I might give here might incriminate me. I have committed no crime. I am guilty of no crime, and I have nothing to fear"

It should be evident that none of the reasons given by appellant were sufficient to make it evident that a

reasonable danger of a tendency to incriminate existed from an answer to the question. Quite the reverse is true. Appellant fully demonstrated at the hearing that he had no fear whatever of giving an incriminating answer; that his reasons for declining to answer were to protect his employer and to wilfully defy the Committee. He had set himself up as a judge over the propriety of the Committee's questions and investigation.

Appellant introduced some evidence at the trial of his case. An examination of this evidence does not supply any probability that the answer would have been incriminating. Appellant limited himself to the introduction of newspaper articles. No showing was made that appellant had even read them. He did not take the stand. He introduced no competent evidence which by any stretch of the imagination would change the color of the obviously innocent question asked to one from which he could reasonably apprehend danger. Leaving aside the question of whether or not a showing made before the trial Court would supply that which was lacking at the hearing itself, nothing was shown from which the trial Court could conclude other than it did conclude that appellant wilfully and contemptuously refused to answer the question.

From the evidence in the Court below it must be concluded that appellant could not reasonably apprehend that the answer to the question "Where are you employed?" could furnish a link in the chain of evidence needed to prosecute him for a federal crime. The only evidence presented was that appellant de-

liberately and contemptuously refused to answer a question of a sub-committee of the Congress of the United States. An examination of the hearing transcript can produce no other conclusion than that appellant claimed the privilege against self-incrimination in bad faith. The privilege against self-incrimination is a valuable safeguard of liberty. This Court should not allow it to be perverted and abused. The privilege cannot be allowed as a shield for contemptuous exercise of the privilege itself.

In the last analysis, the issue before this Court is whether or not there was sufficient evidence in the Court below for Judge O. D. Hamlin's decision that there was no reasonable cause for appellant to apprehend danger from the question asked. This Court has heretofore held "that where any evidence as to the probability of the incriminating nature of an answer is not before it, an Appellate Court may indulge in the presumption that the evidence justified the trial Court's conclusion that there was no such reasonable probability." *Graham v. United States* (9th Cir.), 99 F. 2d 746.

II. APPELLANT WAS DIRECTED TO ANSWER THE QUESTION.

Appellant was asked the question involved here a number of times. He gave various reasons for refusing to answer the question. He claimed that he had a legal right not to answer it and said that he was going to stand on that right. Appellant chooses to interpret the record as indicating that appellant's first so-called

legal objections were not on the ground of the privilege against self-incrimination. The Supreme Court, however, has recently held that “. . . If an objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected both by the committee and by a Court in a prosecution under Section 192.” *Quinn v. United States*, 349 U.S. 155, 162-163.

Appellant claimed he had a right not to answer the question. The only right he had was the right to invoke the privilege against self-incrimination. The Committee could, and was required, to interpret his rather vague language in favor of the privilege. The dissenting judges in the *Quinn* case pointed out the meager evidence upon which the majority found that a claim of privilege was made there. Under the *Quinn* and *Emspak* opinions, 349 U.S. 190, the Committee could not do less than to construe appellant's statements as an attempt to claim the privilege against self-incrimination.

The Supreme Court in *Bart v. United States*, 349 U.S. 219, 222, specifically held that a direction to answer the question informed the accused of the Committee's position. It was said in the majority opinion in the *Quinn* case, at page 170, that “. . . the committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection.”

Here the Committee, after hearing argument by appellant after appellant had conferred with counsel, directed him to answer the question and asked it

again. Mr. Fagerhaugh again declined to answer the question on the ground of his right under the Fifth Amendment. He was asked the question in another way and refused to answer again. While it would possibly have been clearer for the Committee to phrase its overruling of petitioner's objection to the question in the manner required in a Court of law, the Supreme Court recognizes that that is not required. *Quinn v. United States*, supra, at page 170; *Bart v. United States*, supra, at page 222.

Appellant was specifically directed to answer the question after claiming the right not to answer it, and he was asked the question again after refusing to answer it. Appellant could have been under no misapprehension as to the disposition of the Committee with respect to his objection. In the Court below he introduced no evidence to show that he was in fact under any misapprehension as to the disposition of his objection by the Committee. The only evidence before the Court below was that he wilfully and contemptuously refused to answer the question, and that his claim of privilege was made in bad faith. In the absence of evidence that he did not understand that his claim was overruled, criminal intent was not negated as was the case in the *Quinn* and *Emspak* cases.

In none of the three cases decided by the Supreme Court was the defendant directed to answer the question. Here, Mr. Velde, the Chairman of the Committee, not only directed appellant to answer the question but asked it again, and to leave no doubt

whatever on that score, the counsel for the Committee repeated the question in another form when appellant once again declined to answer.

III. APPELLANT WAIVED THE PRIVILEGE.

In *Rogers v. United States*, 340 U.S. 367, the defendant refused to identify a person to whom she had given Communist Party books, after she had first testified that she had herself previously been in possession of the books, stating "I don't feel I should subject a person or persons to the same thing that I'm going through." (at page 368). Thereafter she claimed that an answer to the question might incriminate her. The Supreme Court held that the claim of privilege was pure afterthought and that petitioner had waived her privilege of silence (at page 371).

Appellant argues that Courts look with disfavor upon the contention that the privilege against self-incrimination be waived. There has been no intimation, however, that the principle of the *Rogers* case has been overruled. In the instant case appellant first gave the nature of his employment and then refused to answer the question where he was employed. He placed his refusal to answer upon an untenable ground. Just as in the *Rogers* case, he refused to answer because in his opinion an answer might involve a third party. In the instant case, as in the *Rogers* case, the claim of self-incrimination was "a pure afterthought". Appellant argues that

although petitioner did not feel that an answer to the question would incriminate him his counsel thought otherwise and upon his advice the privilege was claimed. A reading of the record, however, will demonstrate that appellant conferred with counsel before giving any of his answers to the question. When the question was first asked appellant conferred with his counsel, Mr. Treuhaft. After conferring with counsel appellant gave his objections to answering the question. They were that he had a legal right not to answer the question, that the Committee was fully aware of where he was employed, that he didn't see any purpose, that he would rather the Committee enter the fact into the records from their own records, and that he was not going to be a "party to dragging my employer into this smear campaign." After again conferring with counsel appellant declined to answer the question on the ground of his rights under the Fifth Amendment. Immediately thereafter he declared that he did not feel that the answer to the question might incriminate him.

In the instant case appellant testified as to the nature of his employment. The mere detail of where that employment took place presents no more than "a mere imaginary possibility of increasing the danger of prosecution." *Rogers v. United States*, supra, at page 375. Appellant had already testified concerning what his activities were. He refused to testify as to where that activity took place not out of fear of prosecution but out of contempt of the Committee and to protect someone else. Appellant seeks to dis-

tinguish between the *Rogers* case and the instant one by arguing that Fagerhaugh had answered only routine questions as to identification before refusing to answer the question as to where he was employed. The question he refused to answer, however, was but another routine question of identification. The answer he refused to give would no more incriminate than the ones he in fact gave.

Appellant also attempts to distinguish the *Rogers* case by contrasting the culpable nature of the answer "I am treasurer of the Communist Party of Colorado" to the answer "I am a warehouseman." We admit, of course, that the *Rogers* answer was the more incriminating than the one here, this because the answer "I am a warehouseman" was not incriminating at all. The question which Rogers refused to answer also asked for incriminating material while the question in the Fagerhaugh case did not.

In our opinion appellant misconceives the principle in the *Rogers* case. The *Rogers* case held that the witness may not select how far he will go in testifying concerning a single subject matter. As the Court said, "To uphold a claim of privilege in this case would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." (at page 371). Here appellant had testified concerning the subject of his employment. He in effect told the Committee that he would testify concerning his employment as to those facts he desired the Committee to know and would refuse to testify as to those facts he did not desire the Com-

mittee to know. Appellant "opened the door" to questions concerning his employment when he testified concerning its nature. Conceivably he could have refused to testify concerning his employment at all. His employment might have involved illegal activities. However, this possibility was taken out of the case when he testified his employment was as a warehouseman. He might have been justified in refusing to answer any questions concerning other employment he might have, but as to employment as a warehouseman he had waived all objections unless, of course, he showed some special circumstances which would make it evident that some possibility of incrimination existed.

Furthermore, by declaring that he did not feel that any answer he gave might incriminate him, appellant removed any basis for his claim of privilege. He waived the privilege by stating that it did not apply to him. One may not claim the privilege spaciouly. The privilege may not be claimed without reason. Appellant in effect told the Committee that he was not in the class of persons who are entitled to the privilege. By so doing he waived his right, if any, to hide behind the privilege's shield.

Appellant argues that the privilege was not at first claimed by appellant. He states that appellant first declined to answer the question on other grounds and thereafter declined on the ground of the privilege. If appellant is correct, the claim of the privilege is then that "pure afterthought" condemned by the *Rogers* case. Appellant is on the horns of a dilemma.

If he argues that the privilege was claimed when the question was first asked, then it is clear that the objection was specifically overruled and he cannot take advantage of the *Quinn* and *Emspak* cases. If he argues that the privilege was not claimed until after appellant gave his real reasons for not answering the question, he comes within the rule prohibiting the claim of privilege when that claim is "a pure after-thought".

CONCLUSION.

The instant case is a very simple one. It involves the use of the privilege against self-incrimination in bad faith. Appellant used the privilege to show his contempt for the Committee. No Court has ever justified this kind of use of the privilege. This Court should not do so now. The judgment should be affirmed.

Dated, San Francisco, California,
September 15, 1955.

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No. 14,638

United States Court of Appeals
For the Ninth Circuit

OLE FAGERHAUGH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

OPENING BRIEF FOR APPELLANT.

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Subject Index

	Pages
Jurisdictional statement	1
Statute involved	2
Statement of the case.....	2
Specification of error relied upon.....	4
Argument	6
I. Appellant validly asserted the privilege against self-incrimination under the Fifth Amendment.....	6
A. Principles applicable	6
B. The setting in which the privilege was asserted...	7
(1) Evidence as to the general purpose of the subcommittee's investigation	8
(2) Evidence pertaining to the appellant.....	16
C. The subcommittee's purpose in questioning persons named as Communists concerning their places of employment	19
D. The dangers involved in a responsive answer, in the setting of this case, to the question "Where are you presently employed?".....	24
E. The contention that self-incrimination was an imaginary possibility, not a real danger.....	27
F. The contention that the appellant waived the privilege	31
G. The subcommittee's failure to rule upon the appellant's assertion of the privilege or to direct him to answer	39
Conclusion	42
Appendix (Testimony of appellant at hearing of subcommittee of un-American Activities Committee).....	i-ix

Table of Authorities Cited

Cases	Pages
Arndstein v. McCarthy, 254 U.S. 379 (1920).....	34
Bart v. United States, 75 S. Ct. 712 (May 23, 1955)...	5, 6, 40, 43
Blau v. United States, 340 U.S. 159 (1950).....	27
Bowers v. United States, 202 F. 2d 447 (D.C. Cir. 1953)...	8
Emspak v. United States, 75 S. Ct. 687.....	
.....5, 6, 20, 24, 29, 32, 33, 34, 36, 39, 40, 43	
Foot v. Buchanan, 113 Fed. 156 (1902).....	19
Glasser v. United States, 315 U.S. 60 (1941).....	39
Hoffman v. United States, 341 U.S. 479 (1950).....	8, 27, 37, 38
Johnson v. Zerbst, 304 U.S. 458 (1937).....	39
McCarthy v. Arndstein, 262 U.S. 355 (1923).....	34
Poretto v. United States, 196 F. 2d 392.....	19
Quinn v. United States, 75 S. Ct. 688. .5, 6, 18, 33, 34, 35, 40, 42, 43	
Rogers v. United States, 340 U.S. 367 (1950)....	29, 34, 35, 36, 37
Sinclair v. United States, 279 U.S. 263 (1929).....	8
Smith v. United States, 337 U.S. 137.....	32, 33, 39
Twining v. New Jersey, 211 U.S. 78 (1908).....	33
United States v. Lovett, 328 U.S. 303 (1946).....	35
United States v. Raley, 96 F. Supp. 495 (1951).....	19
United States v. Rumely, 345 U.S. 41 (1953).....	39
United States v. St. Pierre, 128 F. 2d 979 (2d Cir. 1942)...	31, 33

Constitutions

United States Constitution:

Fifth Amendment	3, 31, 41, 42
-----------------------	---------------

Rules

Pages

Federal Rules of Criminal Procedure, Rule 37(a)	1
---	---

Statutes

Atomic Energy Act (60 Stat. 755-775, as amended by 65 Stat. 692, Ch. 633)	25
Communist Control Act of 1954 (68 Stat. 775)	25, 36
62 Stat. 807	25
62 Stat. 811	25
62 Stat. 737	24
62 Stat. 799	24
62 Stat. 800	24
64 Stat. 1019-1030	26
64 Stat. 991	26
64 Stat. 992	26
64 Stat. 993	26
64 Stat. 995	26
66 Stat. 205-208	26
66 Stat. 260-262	26
66 Stat. 403	26
66 Stat. 667	26
Subversive Activities Control Act of 1950 (50 U.S.C. 794(a))	25
2 U.S.C., Section 192	1, 2, 3, 8
28 U.S.C., Section 1291	1

Miscellaneous

Annual Report of the Committee on Un-American Activities for the Year 1953	10
Congressional Record, May 11, 1954, page 6031	23

	Pages
100 Things You Should Know About Communism.....	12
San Francisco Call-Bulletin, December 1, 1953	14
San Francisco Chronicle:	
October 29, 1953	13
December 1, 1953	13
San Francisco Examiner:	
November 2, 1953.....	13, 17, 36
December 1, 1953	14
The Shameful Years, Thirty Years of Soviet Espionage in the United States, published December 30, 1951.....	12
Telford Taylor, Grand Inquest (Simon and Schuster, 1955), page 204	25

No. 14,638

United States Court of Appeals For the Ninth Circuit

OLE FAGERHAUGH,

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Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

OPENING BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction of contempt of Congress (2 U.S.C., Section 192). The cause was tried without a jury before the Honorable Oliver D. Hamlin, Jr., a judge of the court below. Appellant was sentenced to thirty days imprisonment and to pay a fine—\$100.

Jurisdiction of this Court to review the judgment of conviction is conferred by 28 U.S.C., Section 1291 and Rule 37 (a) of the Federal Rules of Criminal Procedure.

STATUTE INVOLVED.

The pertinent statute involved, 2 U.S.C., Section 192, provides as follows:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

STATEMENT OF THE CASE.

On December 4, 1953, the defendant and appellant, Ole Fagerhaugh, was called to testify, pursuant to subpoena, at a hearing of a subcommittee of the House Committee on un-American Activities at San Francisco, California. The members of the subcommittee present on the day in question were Representatives Harold H. Velde, chairman, Donald L. Jackson, Gordon H. Scherer, and Clyde Doyle. Mr. Robert L. Kunzig acted as counsel for the subcommittee.

After being sworn, the appellant was asked a few preliminary questions (name, address, place of birth, citizenship, occupation), and then was asked "Where are you presently employed?" Appellant at first re-

fused to answer the question on the ground that the committee already knew his place of employment, a fact which counsel for the committee admitted. However, when the chairman of the subcommittee directed him to answer, appellant, after consulting his attorney, invoked the Fifth Amendment privilege against self-incrimination. The committee did not rule on the validity of the assertion of the privilege or thereafter direct the witness to answer the question. A series of questions pertaining to membership and activity in the Communist Party were also propounded, to all of which the witness likewise invoked the Fifth Amendment. (Source: Transcript of Fagerhaugh testimony, set out in full in the Appendix to this brief.)

On May 11, 1954, the House of Representatives voted to certify Mr. Fagerhaugh's refusal to answer to the United States attorney for prosecution, and appellant was thereupon indicted for contempt of Congress (2 U.S.C. Section 192). The indictment charged only the refusal to answer the question "Where are you presently employed?", a question asserted to be "pertinent to the question then under inquiry before the subcommittee" (Trial Tr. p. 3). A motion to dismiss, raising various points including those raised in this appeal, was filed on behalf of appellant (Trial Tr. p. 6-24) and was denied by the trial court (*id.*, 29, 125). Thereafter, on October 14, 1954, a jury having been waived, the matter came on for trial.

At the commencement of the trial the appellant, through his attorney, offered in open court to purge himself of the charged contempt by answering the

question as to his place of employment, either before the court or before the subcommittee, in any appropriate manner (Trial Tr. p. 34). The trial judge took the offer under advisement and later rejected it (*id.*, 35, 127). After a brief trial appellant was found guilty and sentenced to imprisonment for one month and to pay a fine of one hundred dollars (*id.*, p. 31). Appellant's request for bail pending appeal was denied by the trial court for want of a substantial question. This Court reversed the ruling and ordered appellant admitted to bail in the sum of five hundred dollars. This appeal followed.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Court below erred in holding that a witness before a subcommittee of the House Committee on un-American Activities who has been charged under oath with being a leading Communist is not entitled to invoke the self-incrimination clause of the Fifth Amendment when asked where he is employed.

2. The Court below erred in adjudging a witness in contempt of a subcommittee of Congress where, after the witness invoked the privilege against self-incrimination, the subcommittee failed to rule upon the assertion of the privilege or direct the witness to answer the question.

3. The Court below erred in holding a witness to be in contempt of a subcommittee of Congress for refusing to answer a question as to his place of em-

ployment, where the evidence discloses that the subcommittee was fully aware of the answer, and asked the question for the purpose of harassing the witness and subjecting him to extralegal punishment by bringing about the loss of his job.

(The following additional specifications of error were raised in the court below and are deemed valid. However, it is believed that the specifications set out above are fully dispositive of this appeal in view of the recent decisions of the Supreme Court in the *Quinn*, *Emspak* and *Bart* cases, *infra*. Consequently, specifications 4 to 8, inclusive, will not be argued by the appellant unless requested by the Court.)

4. The Court below erred in holding that a witness who is charged with contempt of a congressional subcommittee because of his refusal to answer a question may not purge the contempt at the time of trial by offering to answer the question in open Court or before the subcommittee.

5. The Court below erred in adjudging the appellant guilty of contempt of a congressional subcommittee on the basis of an incomplete, incorrect and unauthenticated transcript of the record of the witness' testimony before the subcommittee.

6. The Court below erred in invading the appellant's right to privacy in regard to his personal affairs.

7. The subcommittee was acting in excess of and beyond its powers, and with respect to a matter not pertinent to any legitimate subject of inquiry.

8. The subcommittee's inquiry abridged the appellant's right to freedom of speech.

ARGUMENT.

I. APPELLANT VALIDLY ASSERTED THE PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FIFTH AMENDMENT.

A. PRINCIPLES APPLICABLE.

Because we believe that the recent decisions of the United States Supreme Court in *Quinn v. United States*, 75 S. Ct. 688, *Emspak v. United States*, 75 S. Ct. 687, and *Bart v. United States*, 75 S. Ct. 712 (May 23, 1955), are controlling with respect to virtually every aspect of this appeal, we shall commence this argument by summarizing the holdings of those decisions which bear directly upon our case:

1. The privilege against self-incrimination is a privilege of great value. The privilege arose historically in protest against such tyrannical inquisitions as the Star Chamber. It is not to be applied narrowly or begrudgingly, but is to be accorded a liberal construction in favor of the right it was intended to secure.

2. The privilege is for the benefit of the innocent as well as the guilty.

3. Although the privilege against self-incrimination may be waived, the waiver must be intelligent and unequivocal, and is not lightly to be inferred.

4. The disclosures which are protected by the privilege are not limited to admissions that would

subject a witness to criminal prosecution, but extend to any testimony which might furnish a link in the chain of evidence needed to prosecute for a federal crime.

5. Questions concerning membership in the Communist Party or so-called Communist Front organizations fall within the scope of the privilege.

6. Where the injurious potentiality of a question is not apparent on its face, resort is had to the implications of the question, in the setting in which it is asked.

7. Where a witness raises an objection to a question asked by an investigating committee, whether on grounds of pertinency or self-incrimination, it is the duty of the committee to rule upon the objection and, if the objection is overruled, to direct the witness to answer.

8. The power of Congress to investigate does not extend to inquiry into private affairs unrelated to a valid legislative purpose, or to an area in which Congress is forbidden to legislate.

We believe that the foregoing principles, applied herein, require a reversal of the decision of the Court below.

B. THE SETTING IN WHICH THE PRIVILEGE WAS ASSERTED.

The possibly incriminating quality of an answer to a question seemingly "innocent upon its face," such as the question "Where are you presently employed?", is to be determined in the light of "the

implications of the question, in the setting in which it is asked." *Emspak v. United States*, 75 S. Ct. 687, at 692; *Hoffman v. United States*, 341 U.S. 479, 486-487 (1950). Unless it is "perfectly clear from a careful consideration of all the circumstances in the case" that a responsive answer "*cannot possibly*" have a tendency to incriminate, the assertion of the privilege must be sustained. *Hoffman v. United States*, *supra*, at 488. In the present case the setting which establishes the incriminating implications of the question as to the appellant's place of employment will be treated under two heads: (1) Evidence as to the general purpose of the subcommittee's investigation; and (2) Evidence pertaining to the appellant himself.

(1) Evidence as to the general purpose of the subcommittee's investigation.

In order to prove the purpose of the subcommittee's San Francisco hearings, the government called as its first witness one William Wheeler, who identified himself as an investigator for the Committee on un-American Activities.¹ Over objection based on his lack of qualifications to speak for the committee, Mr. Wheeler testified that the subject of the hearings was "the nature, the extent and the objects of the Communist Party in this (San Francisco Bay) area" (Trial Tr. p. 50). He also identified a statement of

¹The purpose of the hearings is a relevant matter of proof for the government in a prosecution under 2 U.S.C. 192 because of the provision in the statute that to render a refusal to answer culpable the question asked must be "pertinent to the question under inquiry" by the committee. See *Sinclair v. United States*, 279 U.S. 263 (1929); *Bowers v. United States*, 202 F. 2d 447 (D.C. Cir. 1953).

purposes made by Chairman Velde on the first day of the hearings (Govt. Exh. 7), pertinent extracts from which follow:²

“It has been fully established by testimony before this and other congressional committees, as well as the courts of our land, that the Communist Party of the United States is *part of an international conspiracy which is being used as a tool or weapon by a foreign power to promote its own foreign policy and which has for its object the overthrow of the governments of all non-Communist countries, resorting to the use of force and violence if necessary.*”

(Govt. Exh. 7, p. 3055.)

* * *

“It is the purpose of this investigation to ascertain the nature, extent, character and objects of *Communist infiltration in the Bay area where there is a great concentration of defense industry* and where the headquarters of District No. 13 of the Communist Party are maintained. This investigation, unlike those conducted in the Territory of Hawaii and southern California, is not concentrated upon a single industry or enterprise. For the time being the work of the committee will be of a more general character.”
(*Ibid.*, p. 3056.)

* * *

“The Committee * * * is concerned only with the facts showing the extent, character, and objects of the Communist Party activities * * * It has the single purpose of disclosing *subversive propa-*

²Italics are added throughout the quotations which follow, unless otherwise noted.

ganda activities and machinations of the conspiracy whenever and wherever there is reason to believe it exists.” (*Ibid.*, p. 3056.)

Further light on the purposes of the San Francisco hearings is shed in the “Annual Report of the Committee on Un-American Activities For The Year 1953” (Def. Exh. N):

“In December 1953 a subcommittee of the Committee on Un-American Activities held hearings in San Francisco, Calif., *which hearings dealt in large part with the nature, scope and objectives of Communist infiltration in that vital defense-area and center of west coast communications.* The committee received valuable testimony from individuals who had been members of the Communist Party and from others who had served as undercover agents for the Federal Government, reporting on activities of the Communist Party in the Bay area. Of particular significance in the San Francisco hearings was the effort made by the International Longshoremen’s and Warehousemen’s Union to coerce the committee into calling off the hearings. This action by union officials of the ILWU in ordering mass protest demonstrations in front of the Federal building demonstrated clearly the element of control exercised by a few individuals, and clearly indicated the need for further investigations in the San Francisco area. *There is reason to believe that in the event of a national emergency, such unquestioned authority and control vested in the hands of individuals who have been identified under oath as past or present members of the Communist Party could be used to completely*

demoralize and hamper an American defense effort." (*Ibid.*, p. 4.)

The 1953 Annual Report also quoted a statement issued by the committee following the completion of the San Francisco hearings, from which the following is taken:

"The nature of the testimony adduced during the week of hearings can lead the committee to one inescapable conclusion, and that is the existence of *a widespread communist infiltration into almost every activity in the Bay area*. The actual extent of that infiltration cannot accurately be determined by the facts presently in the record of the proceedings, but on the basis of similar hearings previously conducted by the committee in other great cities of the Nation it can be stated on considerable authority that the total membership of the Communist Party in this area numbered several thousands of persons." (*Ibid.*, p. 6.)

* * *

"*The myth that the Communist conspiracy constitutes nothing more than the activities of individuals gathered together for the pursuit of legal political activities has long been exploded. Those who meet in secret under assumed names for the purpose of fomenting disorder, turmoil and revolution deserve the name 'conspirators'.*" (*Ibid.*, p. 6.)

Thus, it is clear from the official statements of the committee itself, statements which could be multiplied from the record, that the committee regarded its San Francisco hearings as having the objective of uncov-

ering and exposing a criminal conspiracy which it considered to be "infiltrating" industry in the Bay Area.

The record does not permit any doubt as to the purposes for which, in the committee's view, the Communists seek to infiltrate industry. In its publication entitled "*The Shameful Years, Thirty Years of Soviet Espionage in the United States*," published December 30, 1951 (Def. Exh. M, p. 3), the committee asserts:

"During the entire period covered by this report, *Soviet espionage activity within the United States has been dependent upon the Communist Party, U.S.A., for assistance.* It has been found that, with the exception of high party officials, *Communists pressed into duty for espionage* have been instructed to withdraw from open activity in the Communist Party while so engaged."

In the booklet "*100 Things You Should Know About Communism*" (Def. Ex. G), the committee alleges that Communists in industry are instructed to seek to "capture" the post of shop steward, because it gives them "an opportunity to manufacture grievances, to incite strikes, distribute Communist literature, and collect funds for Communist purposes and *engage in spying.*" In the same booklet, the ILWU, the union at Owens-Illinois Glass Company, where Mr. Fagerhaugh was employed, is described as "Communist dominated," and is said to have the ability in wartime to "*wreck the whole U. S. fighting power.*" (*Ibid.*, pp. 81, 82.)

Further light on the setting in which the San Francisco hearings took place is obtained from an examination of the deluge of newspaper stories which appeared shortly before the hearings commenced. Bay Area newspapers included the following among other statements attributed to committee spokesmen:

(1) A story in the *San Francisco Chronicle* for October 29, 1953 (Def. Exh. H, reported that "several dozen Bay area residents" had been served with subpoenas ordering them to appear at a House Un-American Activities Committee investigation "into Communist activities." It quoted Representative Velde as announcing that the purpose of the hearings was "to investigate reported Communist efforts *to infiltrate 'the various phases of vital defense* and other Communist activities in the Northern California area'."

(2) A story in the *San Francisco Examiner* for November 2, 1953 (Def. Exh. I) quoted a "source close to the committee's operations" as stating that the committee planned to expose the "*elite Top Hundred*" from among Communists in this area. The only specific industrial activity mentioned in the story as slated for committee inquiry is "current infiltration among waterfront unions."

(3) The *Chronicle* for December 1, 1953 (Def. Exh. K) quoted Mr. Velde as announcing that the committee hearings will "go into *all phases of the Communist threat*" and that "The Bay Area is *very important to national defense* and always has been * * * For that reason, *many of the witnesses will come*

from key defense areas, including the waterfront." Informed that the ILWU was contemplating a stop-work meeting in protest against the hearings, Mr. Velde is quoted as replying: "That won't stop us. *They could tie up the whole West Coast in case of war.*" The story added that a number of the persons who have been subpoenaed are "*members and officers of the International Longshoremen's and Warehousemen's Union, particularly Local 6 here.*"

(4) The *San Francisco Call-Bulletin* for December 1, 1953 (Def. Exh. L), quoted Mr. Velde as stating that the hearings would be concerned with "*Red infiltration in bay area defense industries.*" He indicated that the committee was concerned with possible Communist espionage in the Bay Area, stating: "** * * here in San Francisco the first inkling by the FBI that there was a Soviet spy ring operating in this country was brought out by a House Un-American Activities Committee report.*"

(5) The *Examiner* on December 1, 1953 (Def. Exh. J) in a story by Will Stevens, relates that "The House Un-American Activities Committee will open ten days of hearings here this morning into all phases of Communist activities in the Bay area, *with particular emphasis on defense industries along with heavy espionage overtones.*" It quotes Mr. Velde as stating that a "*Soviet espionage ring*" was discovered operating here in 1948. Mr. Velde is also quoted as "pointing out that he considers 'the waterfront and the International Longshoremen's and Warehousemen's Union as part of the defense industry,'" and that he

considered “the waterfront phase very important—the *ILWU* could tie up the entire West Coast as they did the Hawaiian Islands if the word goes out.”

The same story quotes Representative Jackson, the member of the subcommittee who later presented the committee’s position on the Fagerhaugh citation on the floor of Congress (Def. Exh. S), as declaring that the four most important fields which the committee proposed to investigate at the San Francisco hearings were “*atomic research, national defense, communications and labor.*” He is also quoted in the story as saying:

“San Francisco was and is a *natural target for the Communist conspiracy. Its vital defense activities and its position as a great center of world communications rendered it a very desirable location for the infiltration effort.*

“To what extent these efforts were successful will be in a general way demonstrated during the forthcoming hearings.

“It is generally acknowledged that *New York and California are the two focal points of the Communist attack.* It is our job to determine what element of success attended the Communist efforts to obtain a firm foothold in this area. The committee is particularly concerned with those aspects of infiltration which deal with *vital defense and research establishments.*

“Recent disclosures have indicated that *no segment of our national life has escaped the attention of the Communist conspiracy and its agents.*

“*It has been established in sworn testimony that agents of the conspiracy were active in the San*

Francisco Bay area in such fields as atomic research, national defense, communications, and labor.”

Addressing himself to the reported intention of opponents of the committee to stage protest meetings, Representative Jackson branded such opponents as “The dissident two percent who appear willing to condone *espionage, subversion and anarchy* * * *”

To summarize, the openly proclaimed purpose of the investigation was to expose Communist infiltration in the San Francisco Bay Area, especially infiltration into industry. The aim and object of this infiltration, according to numerous statements of spokesmen for the committee, is the commission of a series of criminal acts against the security of the United States, the variety as well as gravity of which will be considered later. Such was the setting in which the appellant was summoned to testify before the subcommittee. We proceed to consider the evidence pertaining to the appellant.

(2) Evidence pertaining to the appellant.

On October 28, 1953, the appellant was served with a subpoena calling on him to testify as a witness before the committee at San Francisco on December 1, 1953 (Def. Exh. A, Trial Tr. 10-11). The subpoena gave the home address of the appellant and recited the fact that his business address was Illinois Glass Company, 601 36th Avenue, Oakland.³ Mr. Fagerhaugh was

³The correct name of the Company is Owens-Illinois Glass Company (Trial Tr. 94).

served at the last mentioned address, his place of employment (Trial Tr. 95). Later he was notified by telegram that the date of his appearance had been continued to December 3, 1953 (Govt. Exh. 4, p. 2; Trial Tr. 11-12).

The record shows that shortly after the appellant received his subpoena the newspapers of the Bay Area commenced to feature prominently the forthcoming probe. Some of the stories which appeared in the local press have previously been quoted. Among them is the Will Stevens story in the *Examiner* of November 2, 1953, in which a "source close to the committee's operations" is quoted as stating that the persons subpoenaed constituted an "elite Top Hundred" among the "active communists" in this area (Def. Exh. I). The same newspaper story declared that "The activities of the 'Top Hundred' have been checked only recently after their activities were first disclosed to the committee by special operatives, working under the direction of the Federal Bureau of Investigation, who joined the Communist Party in this area" (*ibid.*).

The subcommittee's first witness on the morning of December 3rd, the day on which the appellant had been ordered to appear, was one Charles David Blodgett. Mr. Blodgett, a so-called "friendly" witness, testified at great length. Among other things, he stated under oath that he had attended many meetings of a Communist Party group in Alameda County known as the "Political Affairs Committee"; that the committee was a key committee of the Communist Party "as far as all political activity in the county

is concerned"; that it was "charged with the responsibility of actually carrying out the line of the party in every phase of the party's work in Alameda County"; that it "brought together the key people as far as the functioning of the Communist Party is concerned"; that the committee took elaborate precautions to ensure the secrecy of its meetings; that the personnel of the committee included "trade union people, key people in trade unions in the East Bay" (Def. Exh. E, pp. 3296-3297).

Among the "key people in trade unions" identified by Blodgett as having membership in the Political Affairs Committee was the appellant, Ole Fagerhaugh (Def. Exh. E, p. 3297, last line). Mr. Fagerhaugh, who had been ordered to be present on the day of Mr. Blodgett's testimony, was himself summoned to the witness stand the following day.

The testimony given by appellant has already been mentioned briefly. As was pointed out, he declined to state where he was then employed, basing himself on the ground of "my rights under the fifth amendment."⁴ Immediately thereafter, and without first directing the appellant to answer the place of employment question, the committee launched into a series of questions about the appellant's alleged membership and activities in the Communist Party

⁴In the *Quinn* case (75 S. Ct. 668, at 673) the Supreme Court declared that "the term 'Fifth Amendment' in the context of our time is commonly regarded as being synonymous with the privilege against self-incrimination." No contention is made, so far as we know, that the subcommittee was not adequately apprised that the privilege was being invoked.

(Govt. Exh. 8, pp. 3369-3371; Appendix hereto). To each question the appellant asserted the privilege against self-incrimination. These circumstances make relevant those decisions which hold that in determining whether a particular question presents a possibility of self-incrimination, all of the questions asked the witness must be considered as a whole. *Foot v. Buchanan*, 113 Fed. 156, 161 (1902); *Poretto v. United States*, 196 F. 2d 392, 396; *United States v. Raley*, 96 F. Supp. 495, 498 (1951). In view of the subject matter of the hearing, and the obvious interconnection of all of the questions asked the witness, there is no justification for the government's attempt to take the place of employment question out of its actual context, or for its argument that the question had no connection with the remainder of the interrogation, all of which related to Communist membership and activity.

C. THE SUBCOMMITTEE'S PURPOSE IN QUESTIONING PERSONS NAMED AS COMMUNISTS CONCERNING THEIR PLACES OF EMPLOYMENT.

The government contended below that the "Where are you employed" question merely served the purpose of identification of the witness. Wheeler, the investigator who was the government's major witness below, so testified (Trial Tr. 71-73). We have some difficulty in reconciling this contention with the facts that Mr. Fagerhaugh readily identified himself by name and address, and that the committee's own records showed, as their counsel admitted, that the subcommittee had directed the sub-

pena to be served at the appellant's place of employment.

If, however, it be true that mentioning his place of employment might have contributed in some slight degree to Mr. Fagerhaugh's identification, that is of no consequence if the answer would tend to incriminate him. To illustrate, it would undoubtedly have contributed to the identification of the witness if the committee had asked: "Aren't you the Ole Fagerhaugh who obtained employment at Owens-Illinois Glass Company for the purpose of furthering the Communist conspiracy?" Yet there could be no question of his right to refuse to answer such a question on constitutional grounds. The mere fact that the committee might choose to divide the question into two elements (e.g., "Are you the Ole Fagerhaugh who is employed at Owens-Illinois Glass Company?" and "Didn't you obtain employment there for the purpose of furthering the Communist conspiracy?") cannot defeat the right to assert the constitutional privilege. The privilege, as the Supreme Court held once again in the *Emspak* case, is not limited to admissions which "by themselves would support a conviction under a criminal statute" but embraces every "link in the chain of evidence needed to prosecute * * * for a federal crime" (75 S. Ct. at 692-693). The government, we submit, cannot blow hot and cold at the same time; cannot publicly accuse Communists of engaging in a conspiracy to commit all manner of felonious acts in industry, and then deny that the naming by a person charged with being a member of the "Communist

conspiracy” of the place where he is employed—the place where according to the committee he would engage in carrying out the objects of the alleged conspiracy—could possibly constitute an incriminating admission.

Fortunately, we are not required to leave to speculation the committee’s real purpose in inquiring as to the witness’ place of employment. The government’s belated contention that the purpose is merely the “routine” one of identification is refuted by authorities weightier than Mr. Wheeler, namely Chairman Velde of the Un-American Activities Committee and Representative Jackson, one of its leading members. Chairman Velde himself disclosed the true reason for the employment question only a few minutes after Mr. Fagerhaugh had been excused from the witness stand. The transcript discloses that four consecutive witnesses who followed Mr. Fagerhaugh on the witness stand that morning, a Mrs. Williams and Messrs. Ward, Attarian and Black, likewise declined to name their places of employment (Govt. Exh. 8, pp. 3373, 3374, 3378, 3380).⁵ During the testimony of Mr. Ward Chairman Velde volunteered the following explanation of the committee’s interest in where the witnesses were employed:

“Mr. Velde. * * * I want the record to show at this point * * * that the committee has a duty

⁵The questioning of each of these witnesses, with the exception of Mrs. Williams, demonstrated that the committee already knew where each witness was employed, but nevertheless sought to spread the information on the public record. (Govt. Exh. 8, pp. 3375, 3378, 3381-3382).

imposed upon it to ascertain the extent of infiltration and subversion, particularly at the present time, of the Communist Party into various fields of employment. *The reason you are asked concerning your employment is to enable this committee to determine the extent of infiltration of subversive activities into the various industries, various fields of employment.*”

(Govt. Exh. 8, p. 3376.)

In other words, the committee, which accepts as axiomatic that Communists are bent on infiltrating all kinds of industry for subversive purposes, expects the witnesses before it (persons who have been named under oath as Communists) accommodately to describe the place where they are engaged in carrying on their nefarious activities!

Further, and conclusive, proof that the “Where are you employed” question is not mere matter of identification, but is aimed at the uncovering of alleged conspiratorial activities of Communists in industry, is found in the proceedings which occurred in the House of Representatives when the resolution to cite Mr. Fagerhaugh for contempt was voted on. The contempt resolution was presented on behalf of the Un-American Activities Committee by Representative Jackson, who had participated in the San Francisco investigation. Mr. Jackson explained that Mr. Fagerhaugh had invoked the Fifth Amendment with respect to the question “Where are you presently employed?”, and added: “The committee felt that saying that he was employed at the Illinois Glass Co., Oakland,

Calif., could not possibly incriminate him * * '." Representative Keating of New York thereupon asked Mr. Jackson to state "the reason why the committee felt that that question was pertinent to the subject matter under inquiry." To this Mr. Jackson replied as follows:

"Yes, there were two principal reasons why the committee felt that the matter of his place of employment was important. First of all, as a matter of proper identification. *Secondly, one of the principal goals of the Communist Party, as has been developed in testimony, has been to place Communist Party members in certain areas of employment.* We know, for instance, that during the war an effort was made in the Baltimore area to place white collar workers in heavy industry. *That has been developed throughout the country, and in order to develop that pattern, if it exists, the committee has made a very strong effort to determine the place of employment of one who has been identified under oath as a member of the Communist Party.*"

(Cong. Rec. May 11, 1954, p. 6031, Def. Exh. S.)

Clearly, the subcommittee's interest in determining the place of employment of witnesses is not limited to identification, but derives its pertinence from the committee's view that such information is an essential part of its *raison d'être*, the exposure of Communist "infiltration" of industry.

D. THE DANGERS INVOLVED IN A RESPONSIVE ANSWER, IN THE SETTING OF THIS CASE, TO THE QUESTION "WHERE ARE YOU PRESENTLY EMPLOYED?"

As Mr. Chief Justice Warren pointed out in the *Emspak* case, *supra*, in justifying the right of a person charged with being a Communist to invoke the Fifth Amendment in response to innocent-seeming questions about his associations, such information

"* * * could well have furnished a 'link in the chain' of evidence needed to prosecute petitioner for a federal crime, ranging from conspiracy to violate the Smith Act to the filing of a false non-Communist affidavit under the Taft Hartley Act."

Emspak v. United States, 75 S. Ct. 687, at 694.

The same possible violations of federal law are directly involved in the instant case, too, since the appellant was identified under oath by the witness Blodgett not only as a leading Communist, but also as one of the "key people in trade unions" *supra*, p. 18.

Other federal crimes which would be committed in the carrying out of the activities which the committee attributes to Communists include:

Espionage: 62 Stat. 737 (20 years; in wartime death or 30 years).

Sabotage in peacetime: 62 Stat. 800 (\$10,000 or 10 years or both).

Conspiracy to commit sabotage in wartime: 62 Stat. 799 (\$10,000 or 30 years or both).

Theft of atomic secrets: Atomic Energy Act, 60 Stat. 755-775, as amended by 65 Stat. 692, ch. 633 (death or life imprisonment on jury recommendation, otherwise \$20,000 or 20 years or both).

Treason: 62 Stat. 807 (death or \$10,000 and 5 years, or both).

Failure to register as member of subversive organization: Subversive Activities Control Act of 1950, 50 U.S.C. 794(a) (\$10,000 or 5 years or both for each day of failure to register).

Attempting to cause insubordination or disloyalty among military personnel: 62 Stat. 811 (\$10,000 or 10 years or both).

Failure to register as propaganda agent of a foreign principal: Foreign Agents Registration Act, 22 U.S.C. Secs. 611-621 (\$10,000 or 5 years or both).

There should also be mention of the Communist Control Act of 1954, 68 Stat. 775, concerning which a noted legal scholar has remarked:

“The Communist Control Act of 1954 has enlarged even more the basis for claim of privilege, for it prescribes fourteen indicia of Communist membership. Some of them are entirely innocent in themselves, yet each is now declared by law to be evidence of membership, and in conjunction they seem to provide a virtually unlimited basis for invoking the Fifth Amendment.”⁶

⁶Telford Taylor, “Grand Inquest” (Simon and Schuster, 1955), p. 204.

Apart from punishment for specific crimes, "subversive activities" today may result in deportation (66 Stat. 205-208), revocation of citizenship (66 Stat. 260-262), exclusion from government housing (66 Stat. 403), denial of GI educational rights (66 Stat. 667), denial of the right to a passport (64 Stat. 993), indefinite detention in emergency without warrant or trial (Emergency Detention Act of 1950, 64 Stat. 1019-1030), denial of government employment (64 Stat. 991), denial of employment in defense industries (64 Stat. 992), compulsory registration with the Attorney-General (64 Stat. 995), and much more.⁷

With respect to most of the crimes listed above, the place of employment of the defendant would be highly material, indeed would be an essential element of the prosecution's case. It is common knowledge that in Smith Act cases, for example, the government has convicted more than one hundred Communist leaders by evidence believed by the juries, that the Communist Party seeks to persuade the workers of America of the necessity of using force to overthrow the government and abolish private ownership of industry. In prosecutions under the sabotage and espionage laws the place of employment would be equally

⁷All of the penalties mentioned above are "legal" penalties, with which the privilege against self-incrimination is exclusively concerned. Accordingly, there will be no emphasis herein of the drastic "private" or "informal" penalties such as loss of jobs, social ostracism and exposure to public obloquy to which the committee refers when it proclaims its intention to "identify" Communists, "neutralize" their activities, "leave them high and dry on the beach", and "pull out Communism by the roots in this area" (*Examiner*, November 2, 1953, Def. Exh. I).

essential to the proof. In prosecution of a Communist under some of the other laws mentioned above it is clear that his place of employment could easily constitute "a link in the chain of evidence needed in a prosecution" (*Blau v. United States*, 340 U.S. 159, 161 (1950).) It should not be forgotten that according to the theory of the Un-American Activities Committee, as expressed in the extracts from its publications set out above, industry is the main target of the "Communist conspiracy," the *locus* where the alleged machinations of the Party are chiefly carried out. When one considers the wide range of territory covered in a typical prosecution for conspiracy to violate the Smith Act, to name but one example, it surely is a perversion of logic to argue that an admission from an alleged Communist as to his place of employment "*cannot possibly*" have a tendency to incriminate him. *Hoffman v. United States*, 341 U.S. 479, 488 (1950). Such is the test which the Supreme Court emphasized in the *Hoffman* case. It is the test which accords with the liberal construction which must be given to the privilege. It is the test which, applied to the instant case, requires a reversal of the judgment below.

**E. THE CONTENTION THAT SELF-INCRIMINATION WAS AN
IMAGINARY POSSIBILITY, NOT A REAL DANGER.**

The government, while not denying that the witness' place of employment could be an essential element in prosecutions under various laws affecting Communists, argued below that the "danger" of such prosecution in this case was remote and insubstantial,

and also that its existence was shown not by evidence but merely by argument of counsel.

If the government means by this that there was no evidence introduced that a Grand Jury was planning the indictment of Mr. Fagerhaugh for conspiracy to violate the Smith Act, or that Attorney General Brownell was engaged in investigating the appellant's activities with a view to prosecuting him for espionage or sabotage, we must of course agree. However, the government does not cite any authority which requires a showing that prosecution is imminent, nor is there any such authority, to our knowledge.

If on the other hand the government means that the possibility of prosecution of persons who have been identified under oath as "active Communists" and "key people in trade unions" is remote and insubstantial, then it is guilty of a willful misreading of recent history. The Un-American Activities Committee actually boasts of the number of prosecutions of alleged subversives which have been prompted by its exposures (1950 Annual Report Def. Exh. Q, pp. 31-32). The contention that persons identified as prominent Communists are in no real danger of prosecution under federal law comes with ill gráce from a Department of Justice which has convicted more than a hundred persons for conspiracy to violate the Smith Act, others under the non-Communist oath provision of the Taft-Hartley Act, the espionage act, etc., and which has repeatedly announced its purpose of destroying the Communist movement by every means available to it.

It is contended, however, that the transcript of Mr. Fagerhaugh's testimony before the Committee shows that he didn't really "fear" prosecution; that his true motive in refusing to answer was to save his employer from being dragged into a "smear campaign." The contention misses the point. The question is not whether Mr. Fagerhaugh wanted to protect his employer from unpleasant publicity, but whether he had valid grounds for invoking his privilege against self-incrimination. If he had such grounds, the fact that his invocation might serve a secondary purpose is of no consequence. The situation in *Rogers v. United States*, 340 U.S. 367 (1950) relied on below by the government, was entirely different. There the witness, by freely answering questions as to her own membership and activities in the Communist Party, was held to have waived the right to refuse to answer questions as to her associations, since such questions, in the Court's view, "would not further incriminate her" (*Id.*, at 372). There was no such waiver here, as we show in the next section. That a desire to shield others does not vitiate the right to invoke the Fifth Amendment where the witness has adequate grounds for invoking it in his own behalf is made perfectly clear in the *Emspak* case, where the Court upheld the witness' refusal to answer 58 questions concerning his associations. Even Justice Harlan, who dissented in the case, declared:

"The inference most readily to be drawn from the record is that Emspak did not want to 'stool pigeon' against his associates. While *such a motive would not, in my opinion, vitiate an other-*

wise valid claim of the privilege, it certainly furnishes no legal excuse for refusing to answer non-incriminatory questions."

Inherent in the government's position, as expressed in briefs and argument below, is the notion that the test of "fear" or "danger" of prosecution is a subjective one, to be ascertained by probing the state of mind of the witness. Consequently, the government relies on the following colloquy between Mr. Fagerhaugh and the committee (Govt. Exh. 8, p. 3369; Appendix herein):

"Mr. Velde. * * * Where are you employed?

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft [his attorney].)

Mr. Fagerhaugh. I am going to decline to answer that question on the grounds of my rights under the Fifth Amendment.

Mr. Kunzig. Let me put it this way, Mr. Fagerhaugh: Are you employed at the Illinois Glass Co., 601 36th Avenue, Oakland, so that the record will state correctly?

Mr. Fagerhaugh. Same answer.

Mr. Kunzig. You feel that to answer 'Yes' or 'No' to that question would incriminate you?

Mr. Fagerhaugh. I don't feel that that answer or any answer I might give here might incriminate me. I have committed no crime. I am guilty of no crime, and I have nothing to fear. Now, my rights under the Constitution state that I may decline to answer this question on the grounds that I am guaranteed the right not to act as a witness against myself, and for further reasons—".

It is submitted that the witness' statement "I have nothing to fear" does not detract from his assertion of the privilege. It is probable that the statement was merely an assertion of a refusal to be intimidated by the committee. But if it be regarded as an expression of the witness' personal opinion as to the probability of prosecution for a federal crime, it changes nothing. The opinion of Mr. Fagerhaugh, a layman, that he had "nothing to fear" was obviously not shared by his attorney, Mr. Treuhaft, on whose advice Mr. Fagerhaugh invoked the Fifth Amendment. Furthermore, to make a witness' quantum of intestinal fortitude the measure of the right to claim the privilege would lead to fantastic results. A timid or nervous witness could validly rely on the privilege under circumstances where it could not fairly be claimed that a responsive answer would endanger him in the slightest degree, whereas a bold and fearless witness might be prevented from relying on the privilege under conditions of the utmost danger of prosecution. The exercise of important constitutional rights cannot be made to depend on such a frivolous distinction. See *United States v. St. Pierre*, 128 F. 2d 979, 980 (2d Cir. 1942).

F. THE CONTENTION THAT THE APPELLANT WAIVED THE PRIVILEGE.

The colloquy which was quoted in the preceding section raises another of the government's arguments, that of an alleged waiver of the privilege. Apparently it is the position of the government that Mr. Fagerhaugh lost the right to invoke the privilege when he

said that he did not feel that any of his answers would incriminate him, and added that he was guilty of no crime. In this the government is mistaken.

Preliminarily it should be noted that the Courts look with disfavor upon the contention that the privilege against self-incrimination has been waived. As the Supreme Court declared in *Emspak*, 75 S. Ct. 687, at 691, quoting from its decision in *Smith v. United States*, 337 U. S. 137, 150:

“Although the privilege against self-incrimination must be claimed, when claimed it is guaranteed by the Constitution * * * Waiver of constitutional rights * * * is not lightly to be inferred. A witness cannot properly be held after claim to have waived his privilege * * * upon vague and uncertain evidence.”

With this principle in mind we turn to consider whether the colloquy quoted above amounted to a waiver by Mr. Fagerhaugh of the privilege against self-incrimination.

First of all, it is clear from the context that when Mr. Fagerhaugh denied that his answer would “incriminate” him he used the word in the sense of “establish guilt,” as proven by the fact that in the very next sentence he said that he was guilty of no crime. The privilege, however, “is not limited to admissions that ‘would subject [a witness] to criminal prosecution’,” but “also extends to admissions that may only *tend* to incriminate” (*Emspak v. United States*, 75 S. Ct. 687, at 692 (Italics added). It is therefore wrong to contend that the aforementioned

answer constituted an abandonment of the privilege, especially in view of the fact that in practically the same breath the witness reasserted his constitutional right "not to be a witness against myself."

Second, it may be contended that Mr. Fagerhaugh's assertion that he had "committed no crime," was "guilty of no crime," is tantamount to a waiver of the privilege. What was said in the preceding paragraph is likewise applicable here. In addition, it is pertinent to note the Supreme Court's recent reiteration of the famous dictum of *Twining v. New Jersey*, 211 U.S. 78, 91 (1908), that the privilege against self-incrimination is "a protection for the innocent" as well as for the guilty. *Quinn v. United States*, 75 S. Ct. 668, at 673. In the *Emspak* case the following colloquy took place at the committee hearing (*supra*, at 691):

"Mr. Moulder. Is it your feeling that to reveal your knowledge of them would subject you to criminal prosecution?"

Mr. Emspak. No. I don't think this committee has a right to pry into my associations. That is my own position."

The Court held that this did not constitute a waiver, citing its similar holding in *Smith v. United States*, *supra*. The applicability of these decisions to the instant case is clear and requires no elaboration.⁸

⁸The Supreme Court also quotes approvingly from *United States v. St. Pierre*, 138 F. 2d 979, 980 (C.A. 2d 1942), as follows:

"Nor is it material that appellant stated at several points that he had committed no federal crime; such a contradiction,

The government also contends that the appellant waived his right to invoke the privilege as to his place of employment when he answered preliminary questions as to name, address, birthplace, citizenship and occupation. The last item is particularly stressed. It is argued that when Mr. Fagerhaugh testified that he is a warehouseman by occupation he "waived the privilege by giving testimony on the subject under inquiry." (The quotation is from the government's "Memorandum in Opposition to Motion to Dismiss and Motion to Acquit," page 8). *Rogers v. United States*, 340 U.S. 367 (1950) is relied on as authority for this proposition. We cannot agree.

It would require considerable brashness to assert that all is crystal clear with respect to the law regarding waiver of the privilege against self-incrimination. Compare *Arndstein v. McCarthy*, 254 U.S. 379 (1920) and its companion decision, *McCarthy v. Arndstein*, 262 U.S. 355 (1923), with *Rogers v. United States*, *supra*. The effect of the *Rogers* decision, as the dissenting justices point out, is to burden the harried witness with questions of timing complex enough to baffle a stable of Philadelphia lawyers. In the retrospective light cast on the problem of waiver by the extremely liberal decisions in *Quinn* and *Emspak*, *supra*, especially the latter, the *Rogers* case appears to represent an illiberal trend which has now been decisively repudiated by the Supreme Court. In any

especially by a nervous or excitable witness would not overcome a clear claim of privilege if he was otherwise entitled to the privilege."

event, the situation here is in no way comparable to *Rogers*. In the latter case the witness had, in the words of the Court “freely described her membership, activities and office in the Party” (340 U.S. at 372). She was then asked a question as to her successor in office as Treasurer of the Communist Party in Denver, and refused to answer on grounds of self-incrimination. Because she had already answered the “\$64 question,” the Court was of the opinion that “response to the specific question in issue here would not *further incriminate her*” (*Italics added*).

Fagerhaugh’s case is quite different. He answered routine questions as to identification, and stated that he was a warehouseman. But the transcript shows that when he was asked to state where he was employed *he consulted with his attorney* and then declined to answer the question. True, he at first placed his declination on the ground that the committee already knew his place of employment, the plain implication being that the question was “unrelated to a valid legislative purpose.” (*Quinn, supra*, at 672) and was being asked in furtherance of the committee’s avowed but illegal objective of “exposing subversives” and thereby causing them to lose their jobs.⁹ It is in-

⁹The committee boasts that its hearings on Louis Dolivet resulted in his loss of United Nations employment and removal as editor of *United World*. *Annual Report*, 1950, pp. 4-5.

The committee was responsible for the legislation depriving three government employees of their positions, later declared unconstitutional as a bill of attainder. *United States v. Lovett*, 328 U.S. 303, 308, 309, 315 (1946).

The transcript of the San Francisco hearings shows that two witnesses complained to the committee that being subpoenaed to testify before the committee cost them their jobs, even before they

ferable that here, as in the *Emspak* case, the witness' initial reluctance to use the Fifth Amendment was based on a desire to avoid "the unpopular opprobrium which often attaches to its exercise" (*Emspak v. United States, supra*, at 690), a fact which, as the Court there held, should make the committee "all the more ready to recognize" a claim of the privilege, even in veiled form.

The government must indeed be hard pressed for arguments if it finds it necessary to seek to analogize the answer "I am Treasurer of the Communist Party of Colorado" (*Rogers*) to the answer "I am a warehouseman" (Fagerhaugh), with the necessary implication that the latter response constituted such an "admission of guilt or incriminating facts" as would compel him to go on because his testimony could not "further incriminate him" (*Rogers v. United States*, 340 U.S. 367, 373). It is true, as the government was at pains to point out below, that membership in the Communist Party is not *per se* criminal, although the sweeping provisions of the Communist Control Act of 1954, 68 Stat. 775, the so-called "outlawry" statute, now make this proposition anything but obvious. But

testified. George Van Frederick (Def. Exh. D, pp. 3240, 3241) and James Fenton Wood (*ibid.*, p. 3243). The committee even goes to the length of implying that it will trade its assistance in getting the witness' job back for the witness' cooperation in waiving his right to refuse to testify on Fifth Amendment grounds, viz.:

"Mr. Wood. Will the committee take action to get my job back?"

Mr. Jackson. Will you take action to cooperate with the committee in telling us what you know about the Communist conspiracy?"

(Def. Exh. D, p. 3245.)

it smacks of hypocrisy for a representative of the Department of Justice, which has recently been initiating prosecutions under the membership provisions of the Smith Act, to suggest that an admission of membership in the Communist Party is not, in these parlous times, in the highest degree incriminating within the contemplation of the Fifth Amendment, or that a general statement that one is a warehouseman, one of the many thousands of persons who follow that vocation, is in the same category. Justice is not promoted by such casuistry.

With respect to the matter of waiver, the facts of the instant case are far closer to *Hoffman v. United States*, 341 U.S. 479 (1950) than to the *Rogers* case. In *Hoffman*, the Supreme Court upheld the refusal of a witness, upon the ground of possible self-incrimination, to answer a question as to his occupation. In addition, the witness was asked seven questions regarding a certain William Weisberg, three of which he answered and four of which he refused to answer on claim of the privilege against self-incrimination. A careful reading of the opinion (which, incidentally, was subsequent to *Rogers v. United States*), indicates that while the question of waiver was not as such discussed, the Court was aware that answers had been given to some of the questions. Notwithstanding this the claim of privilege was held valid. The language of the Court in this connection is illuminating:

“But of the seven questions relating to Weisberg (of which three were answered), three were designed to draw information as to petitioner’s

contacts and connection with the fugitive witness; and the final question, perhaps an afterthought of the prosecutor, inquired of Weisberg's whereabouts at the time. All of them could easily have required answers that would forge links in a chain of facts imperiling petitioner with conviction of a federal crime. The three questions, if answered affirmatively, would establish contacts between petitioner and Weisberg during the crucial period when the latter was eluding the grand jury; and in the context of these inquiries the last question might well have called for disclosure that Weisberg was hiding away on petitioner's premises or with his assistance. Petitioner could reasonably have sensed the peril of prosecution for federal offenses ranging from obstruction to conspiracy.

"In this setting it was not 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer cannot possibly have such tendency' to incriminate."

(*Hoffman v. United States*, *supra*, at 488-489.)

The government in a memorandum filed below admitted that *Hoffman* "does have similarities to the present case" but attempted to distinguish it on the ground that in *Hoffman* a grand jury had been invoked to investigate "the whole gamut of federal crimes," and the defendant was a "notorious gangster" with a criminal record. The argument overlooks the fact that Communists today are threatened with prosecution under a veritable arsenal of repressive laws, as was pointed out in detail above, and that

a person named under oath as a leading Communist faces as great if not a greater peril of prosecution than a gangster. To refuse to see this could only be the result of that wilful blindness to realities which Mr. Justice Frankfurter, quoting the late Chief Justice Taft, castigated in *United States v. Rumely*, 345 U.S. 41, 44 (1953).

In sum, there was no “intelligent and unequivocal” waiver of the privilege against self-incrimination. There was in fact no waiver at all, express or implied. On the contrary, there was an explicit invocation of the privilege, on the advice of counsel, which was never abandoned. As the Supreme Court declared regarding the government’s similar contention in *Emspak*:

“To conclude otherwise would be to violate this Court’s own oft-repeated admonition that the Courts must ‘indulge every reasonable presumption against waiver of fundamental constitutional rights.’ ”¹⁰

G. THE SUBCOMMITTEE’S FAILURE TO RULE UPON THE APPELLANT’S ASSERTION OF THE PRIVILEGE OR TO DIRECT HIM TO ANSWER.

Apart from the appellant’s valid reliance upon the privilege against self-incrimination, there is a second, independent reason why the decision below constitutes error and must be reversed. We refer to the subcommittee’s failure to rule upon the appellant’s assertion

¹⁰*Emspak v. United States*, 75 S. Ct. 687, at 692, citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1937); *Glasser v. United States*, 315 U.S. 60, 70 (1941), and *Smith v. United States*, 337 U.S. 137, 150 (1948).

of the privilege or to direct the appellant to answer the question after the privilege was invoked.

As has been noted, the appellant at first demurred at answering the place of employment question on the ground that the committee already knew the answer, the implication being that the question was not asked in furtherance of a legitimate legislative objective but for the purpose of imposing extralegal punishment. This objection the committee specifically overruled by directing the witness to answer (Govt. Exh. 8, 3368, last line; Appendix hereto). At that point Mr. Fagerhaugh, after consulting with his attorney, stated that he declined to answer the question "on the grounds of my rights under Fifth Amendment." *The committee did not rule upon the validity of the objection or again direct the witness to answer.* The witness was therefore not "clearly apprised that the committee demand[ed] his answer notwithstanding his objections," and hence there was no establishment of the criminal intent requisite to a conviction under Section 192. *Quinn v. United States, supra*, at 674-677; *Emspak v. United States, supra*, at 694; *Bart v. United States, supra*, at 714-715.

The seriousness of the committee's failure to direct Mr. Fagerhaugh to answer is compounded by the fact that the transcript gives excellent reason for believing the committee acquiesced in the assertion of privilege and abandoned the question. Following the invocation of the privilege a colloquy took place between Mr. Fagerhaugh and Chairman Velde in which the latter asked the witness to state why he felt he was entitled

to rely on the Fifth Amendment when he had “committed no crime.” Mr. Fagerhaugh thereupon consulted his attorney and then endeavored to explain his position in response to the chairman’s request, as follows:

“Mr. Fagerhaugh. I want to make very clear my position on this because what is said here to-day may some day be used in a court of law, and so I want it clearly understood the reason—my reasons for claiming the right not to answer this question under the Fifth Amendment, and I would like to—

Mr. Velde. Proceed, Mr. Counsel.

Mr. Kunzig. Mr. Chairman, the witness has refused to answer on the grounds of the Fifth Amendment, and has said under oath he has not committed any crime. I should like therefore to ask him this question, whether you have ever been a—

Mr. Treuhaft. Just a moment, counsel. The answer has not been finished, and you have interfered and interrupted.”

There was then further consultation between the witness and his attorney, after which the following took place:

“Mr. Fagerhaugh. I would like to continue—

Mr. Kunzig. *There is no question before the witness.*

Mr. Velde. *There is no question before the witness.*

Mr. Fagerhaugh. I have not finished answering my reasons.

Mr. Velde. You have been given permission and opportunity to confer with your counsel. *No question is pending.*”

The subcommittee then dropped the matter of the witness' place of employment and proceeded to question him about his membership in the Communist Party (Govt. Exh. 8, p. 3369; Appendix hereto).

The sentences italicized above are without plausible meaning except as an abandonment by the committee, following the assertion of the privilege, of its question concerning the witness' place of employment. In any event, in view of the foregoing exchange, it cannot tenably be argued that the witness had been "clearly apprised that the committee demand[ed] his answer notwithstanding his objections" or that he had been "confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt" (*Quinn v. United States, supra*, at 675). As in the *Quinn* case, "at best he was left to guess whether or not the committee had accepted his objection" (*ibid.*). Such a situation is incompatible with the requirement that a "deliberate, intentional refusal to answer" be established beyond a reasonable doubt (*ibid.*, at 674-675).

CONCLUSION.

During the trial below, as well as in the "Statement of Points on Which Appellant Relies", other grounds of error were advanced in addition to those arising out of the appellant's invocation of the Fifth Amendment, including lack of pertinency of the question, abridgement of the right of free speech, invasion of

the appellant's right to privacy, purgation of the alleged contempt, and incompleteness of the transcript of the committee hearing. These grounds were advanced in good faith and are not abandoned. However, it is the belief of counsel that the *Emspak*, *Quinn* and *Bart* cases are so directly in point and so completely dispositive of this appeal, that it would be a work of supererogation to burden the Court at this time with argument on the other issues. Accordingly, this brief has been limited to the issue of the privilege against self-incrimination. Should the Court indicate a desire for discussion of any of the other points, either in a supplemental brief or at the oral argument, counsel will be happy to comply.

It is respectfully requested that the judgment below should be reversed and the appellant acquitted.

Dated, Oakland, California,

July 8, 1955.

Respectfully submitted,
 EDISES, TREUHART, GROSSMAN & GROGAN,
 By BERTRAM EDISES,
 EDWARD R. GROGAN,
Attorneys for Appellant.

(Appendix Follows.)



Appendix.



Appendix

TESTIMONY OF OLE FAGERHAUGH, ACCOMPANIED BY HIS COUNSEL, ROBERT E. TREUHAFT.

Mr. Kunzig. Would you state your full name, please, for the record?

Mr. Fagerhaugh. My name is Ole Fagerhaugh.

Mr. Kunzig. How do you spell that, sir?

Mr. Fagerhaugh. First name, O-l-e; last name, F-a-g-e-r-h-a-u-g-h.

Mr. Kunzig. Mr. Fagerhaugh, I see you are accompanied by counsel. Would he please state his name and address for the record?

Mr. Treuhaft. My name is Robert E. Treuhaft, attorney at law, 1440 Broadway, Oakland. I would like to——

Mr. Kunzig. Mr. Fagerhaugh——

Mr. Treuhaft. Mr. Kunzig, I would like to say one word. I understand that at the close of my testimony yesterday a ruling was made that my subpoena was continued. Since I consider a subpoena by this committee a form of intimidation——

Mr. Jackson. No, yours was not extended, Mr. Treuhaft. The action pertained to the witness who preceded you.

Mr. Treuhaft. Is it understood then that I am no longer under subpoena before this committee?

Mr. Jackson. Yes; when you were dismissed from the committee, you were dismissed from any further obligation of the subpoena.

Mr. Kunzig. Mr. Fagerhaugh, would you state your address, please?

Mr. Fagerhaugh. I live at 2285 East 19th Street, Oakland.

Mr. Kunzig. When and where were you born, sir?

Mr. Fagerhaugh. Well, I was born in May in the year of the San Francisco earthquake, but I assure you I was born in Norway, so I couldn't have had anything to do with that. I was born in Tromso, Norway, T-r-o-m-s-o.

Mr. Kunzig. Are you now a citizen of the United States?

Mr. Fagerhaugh. I am.

Mr. Kunzig. When did you become a citizen?

Mr. Fagerhaugh. I became a citizen by virtue of my father's becoming a citizen while I was still a minor.

Mr. Kunzig. When did he become a citizen?

Mr. Fagerhaugh. I think it was in 1912, if I am not mistaken.

Mr. Kunzig. What is your present employment, sir?

Mr. Fagerhaugh. I am a warehouseman.

Mr. Kunzig. Where are you employed?

(Upon order of the Chairman, certain remarks of the witness were ordered stricken at this point.)

Mr. Velde. Will you answer the question, please? What is your employment?

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

(Upon order of the chairman, certain remarks of the witness were ordered stricken at this point.)

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Velde. Now will you answer the question, Mr. Witness, or give your legal basis for refusing to answer the question?

Mr. Fagerhaugh. Well, I am trying to give my reasons, including my legal reasons for refusing to answer this question, and I would like to proceed to do that if the committee will permit.

Mr. Jackson. Your opinion of the committee is not a legal reason for refusing to answer the questions. As a matter of fact, the committee is not at all concerned with your opinion of it.

Mr. Scherer. I am going to object to counsel in this case again telling the witness what to say.

Mr. Treuhaft. I am going to object to the committee making inferences that are unjustified.

Mr. Velde. The counsel should know his rights to confer with his witness. This is not a court of law as counsel well knows.

Mr. Treuhaft. I am aware of that.

Mr. Velde. This is a committee of Congress trying to ascertain the true facts about subversion in this country, and I ask that the counsel for the witness please remember that fact and act in accordance with the rules of the committee.

Will the witness answer the question?

Mr. Fagerhaugh. Will you repeat the question, please?

Mr. Kunzig. I believe if I recall correctly that the question was, Where are you presently employed?

Mr. Fagerhaugh. I am going to continue to stand on my right not to answer that question because, as

I say, the committee is already fully aware of where I am employed, and I don't see any purpose——

Mr. Scherer. Frankly I don't know where you are employed, I have no idea where you are employed, and the record should show where you are employed. It is not on the record, Mr. Chairman.

Mr. Velde. Frankly, I don't know, either, and I don't know whether any member of the committee knows.

Mr. Fagerhaugh. I would rather the committee enter that fact into the record from their own records. I am not going to be a party to dragging my employer into this smear campaign.

Mr. Jackson. Does the committee know where the witness is employed?

Mr. Kunzig. Yes, sir. May I answer that in 1 minute? I should like first to request that the witness be directed to answer that question, and then I will ask another one about the address.

Mr. Velde. Certainly, the witness is directed to answer the question. Where are you employed?

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Fagerhaugh. I am going to decline to answer that question on the grounds of my rights under the fifth amendment.

Mr. Kunzig. Let me put it this way, Mr. Fagerhaugh: Are you employed at the Illinois Glass Co., 601 36th Avenue, Oakland, so that the record will state correctly?

Mr. Fagerhaugh. Same answer.

Mr. Kunzig. You feel that to answer "Yes" or "No" to that question would incriminate you?

Mr. Fagerhaugh. I don't feel that that answer or any answer I might give here might incriminate me. I have committed no crime. I am guilty of no crime, and I have nothing to fear. Now, my rights under the Constitution state that I may decline to answer this question on the grounds that I am guaranteed the right not to act as a witness against myself, and for further reasons——

Mr. Velde. In a criminal proceeding; is that not true? And you say you have committed no crime whatsoever. Then do you still feel that you are entitled to the protection of the fifth amendment, when you have committed no crime?

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Fagerhaugh. I want to make very clear my position on this because what is said here today may some day be used in a court of law, and so I want it clearly understood the reason—my reasons for claiming the right not to answer this question under the fifth amendment, and I would like to——

Mr. Velde. Proceed, Mr. Counsel.

Mr. Kunzig. Mr. Chairman, the witness has refused to answer on the grounds of the fifth amendment and has said under oath he has not committed any crime. I should like therefore to ask him this question, whether you have ever been a——

Mr. Treuhaft. Just a moment, counsel. The answer has not been finished, and you have interfered and interrupted.

Mr. Velde. Counsel knows his right to advise with his client; it is limited to that.

Mr. Treuhaft. I want to consult with my client.

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Velde. Give the counsel an opportunity to talk with the witness.

Mr. Kunzig. Mr. Chairman, may I continue with the questioning?

Mr. Fagerhaugh. I would like to continue——

Mr. Kunzig. There is no question before the witness.

Mr. Velde. There is no question before the witness.

Mr. Fagerhaugh. I have not finished answering my reasons.

Mr. Velde. You have been given permission and opportunity to confer with your counsel. No question is pending.

Mr. Fagerhaugh. I still didn't finish the question that was asked.

Mr. Kunzig. For the record, to make it clear, the previous question the witness declined to answer on the grounds of the fifth amendment. Now I ask this question, Mr. Fagerhaugh: Have you ever been a member of the Communist Party——

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Kunzig (continuing). Political Affairs Committee of Alameda County?

Mr. Fagerhaugh. I am not going to answer any further questions until I have been given an oppor-

tunity for the record to give a complete answer to the last question that was asked of me.

Mr. Velde. Well, will you give a complete answer, or will you refuse to answer, as you have done before?

Mr. Fagerhaugh. I want to give my reasons for declining to answer.

Mr. Velde. You may give your reasons, your explanation, if you will answer the question, but certainly not if you refuse to answer the question.

Mr. Fagerhaugh. I think it should be made very clear my reasons for refusing to answer this question because the committee seems to raise the question, well, what have I to fear to answer a question like where do I work. Well, for the sake of the record, I want my reasons, I want to give my reasons for declining to answer under the fifth amendment because this case may come into a court of law, and I want it clearly understood what my reasons are. Now, I would like——

Mr. Velde. You say you have committed no crime. Then how can you sit there and claim the privileges against self-incrimination?

Mr. Fagerhaugh. Because the fifth amendment was drawn up to protect the innocent as well as the guilty, as you well know, and Chief Justice Rutledge has said, and if I may quote him——

Mr. Velde. The committee is well aware of the——

Mr. Fagerhaugh. I am not so certain the committee is well aware, and for the record I would like to give a brief quote.

Mr. Jackson. In regular order, Mr. Chairman, let us have the questions and get the declinations or the answers.

Mr. Velde. If the witness continues to make voluntary statements not in answer to the question that counsel asks and the members of this committee ask, I assure you that you will be removed from the hearing room.

Proceed, Mr. Counsel.

Mr. Kunzig. The question now before the witness which he has been evading, Mr. Chairman, is: Have you ever been a member of the Political Affairs Committee of the Communist Party of Alameda County, a very simple question to answer.

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Fagerhaugh. Pardon me, what was the question?

(Representative Donald L. Jackson left the hearing room at this point.)

Mr. Kunzig. Well, I just wonder how you can confer all that time without knowing the question, but I will repeat it for about the fourth time, Mr. Witness. Have you ever been a member of the Political Affairs Committee of the Communist Party of Alameda County, as was testified here yesterday by Mr. Blodgett?

Mr. Fagerhaugh. I decline to answer that question on the grounds of the fifth amendment.

Mr. Kunzig. Have you ever been a member of the Communist Party at any time whatsoever?

Mr. Fagerhaugh. I likewise decline to answer that question on the grounds of my rights under the fifth amendment.

Mr. Kunzig. Are you now a member of the Communist Party?

Mr. Fagerhaugh. I further decline to answer that question on the grounds of the fifth amendment.

Mr. Kunzig. No further questions, Mr. Chairman.

Mr. Velde. Mr. Scherer.

Mr. Scherer. No questions.

Mr. Velde. Mr. Doyle.

Mr. Doyle. No questions.

Mr. Velde. I have no further questions——

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Velde. Except I would like to make this observation as I did with the previous witness: Your refusal to give this committee information concerning subversive activities in which you might have been engaged or that you might have been engaged in in this area can only lead us to believe that you must presently be engaged in subversive activities.

Is there any reason why this witness should be further retained under subpoena?

Mr. Kunzig. No, sir.

Mr. Velde. The witness is dismissed, and the committee will be in recess for 10 minutes.

No. 14641

United States
Court of Appeals
for the Ninth Circuit

FLORENCE LILLIAN FLUMERFELT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division

FILED

MAR 21 1955

PAUL E. GILLEN, CLERK

No. 14641

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Appeal:

Certificate of Clerk to Transcript of Record on	22
Designation of Record on (DC)	11
Notice of	10
Statement of Points on (DC).....	11
Statement of Points and Designation of Rec- ord on (USCA)	48
Stipulation as to Record on (DC).....	20
Certificate of Clerk to Transcript of Record....	22
Designation of Record (DC).....	11
Exhibit A—Hearing before Examiner of Feb. 9, 1954	12
Names and Addresses of Attorneys.....	1
Notice of Appeal	10
Order Denying Petition for Citizenship.....	7
Examiner's Recommendation that Petition be Denied	8
Order Extending Time for Filing Transcript of Evidence	21

Petition for Citizenship No. 45554.....	3
Statement of Points on Appeal (DC).....	11
Statement of Points and Designation of Record on Appeal (USCA)	48
Stipulation as to Record on Appeal.....	20
Transcript of Hearing of Feb. 9, 1954.....	12
Transcript of Proceedings of Nov. 15, 1954.....	24

Witnesses:

Flumerfelt, Florence Lillian

—direct	26
—cross	32
—redirect	37

Miller, Fay L.

—direct (Sullivan)	38
—cross	42
—redirect	44
—recross	44
—direct (Belcher)	45

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Form N-405—United States Department of Justice
Immigration and Naturalization Service.

Original (to be retained by Clerk of Court)

United States of America

PETITION FOR NATURALIZATION
(Under General Provisions of the Immigration
and Nationality Act)

No. 45554

To the Honorable the U. S. District Court of W.
Dist. of Wash., at Seattle, Wash.

This petition for naturalization, hereby made and
filed, respectfully shows:

(1) My full, true, and correct name is Florence
Lillian Flumerfelt aka Lynn Parry aka Lynn
Flumerfelt.

(2) My present place of residence is 605 Yesler
Way, Seattle, King, Wash.

(3) My occupation is Waitress.

(4) I am 25 years old.

(5) I was born on September 4, 1927, in Orrville,
Ont., Canada.

(6) My personal description is as follows: Sex
Female, complexion Fair, color of eyes Brown, color
of hair Brown, height 5 feet 5½ inches, weight 160
pounds, visible distinctive marks moles rt. of mouth
and chin; country of which I am a citizen subject,
or national Canada.

(7) I am not married; * * *

(8) I have no children; * * *

(9) My lawful admission for permanent residence in the United States was at Detroit, Michigan, under the name of Florence Lillian Flumerfelt on April 5, 1948, on the Detroit and Canada Tunnel.

(10) Since my lawful admission for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, except as follows: * * * * *

(16) I have resided continuously in the United States of America for the term of 5 years at least immediately preceding the date of this petition, to wit, since April 5, 1948, and continuously in the State in which this petition is made for the term of 6 months at least immediately preceding the date of this petition, to wit, since April 1949; and during the past 5 years I have been physically present in the United States for at least one-half of that period.

(17) I have not heretofore made petition for naturalization.

* * * * *

(18) Attached hereto and made a part of this, my petition for naturalization, are the affidavits of at least two verifying witnesses required by law.

(19) Wherefore I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to Lynn Flumerfelt. I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, and that the same are true to the best of my knowledge and belief, and that this petition is signed by me

with my full, true name: So Help Me God.

/s/ Florence Lillian Flumerfelt

Alien Registration No. A6 899 534.

Affidavit of Witnesses

Depositions: Two in Los Angeles from May 31, 1948 to Jan. 1949.

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

(1) My name is Ruby Chin Lew, my occupation is Stenographer. I reside at 417 11th Ave., Seattle, Washington, and

(2) My name is Reba Parker, my occupation is Ice Cream Packer. I reside at 2309 26th S., Seattle, Washington.

I am a citizen of the United States of America; I have personally known and have been acquainted in the United States with the petitioner named in the petition for naturalization of which this affidavit is a part, since at least Lew—May, 1949; Parker—March 1949, to my personal knowledge the petitioner has resided, immediately preceding the date of filing this petition, in the United States continuously since the date last mentioned; that the petitioner has been physically present in the United States for at least...months of that period; and that he has resided at Seattle in the State of Washington continuously since at least May 1949. I have personal knowledge that the petitioner is and during all such periods has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the

good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States. have made in the affidavit to this petition for naturalization subscribed by me are true to the best of my knowledge and belief: So Help Me God.

/s/ Ruby Chin Lew

/s/ Reba Parker

(Signature of Witnesses)

When Oath Administered by Designated
Examiner

Subscribed and sworn to before me by above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit at Seattle, Washington, this 1st day of June, A.D. 1953.

/s/ R. S. Sullivan,

Designated Examiner

I hereby certify that the foregoing petition for naturalization was by petitioner named herein filed in the office of the clerk of said court at Seattle, Washington, this 1st day of June, A.D. 1953.

[Seal]

Millard P. Thomas, Clerk

Y. Florence Ota, Deputy Clerk

* * * * *

Florence Lillian Flumerfelt

Lynn Flumerfelt

A true copy. Attest: Millard P. Thomas, Clerk;
signed by E. M. Groff, Deputy. * * * * *

Nov. 17, 1954—Ent. order denying petition for naturalization—failure to establish good moral character.

Form N-484-A—United States Department of Justice—Immigration and Naturalization Service.

Original

Order No. 2552

ORDER OF COURT DENYING PETITION
FOR NATURALIZATION

In the United States District Court of Western
District of Washington at Seattle, Washington.

United States of America,
Western District of Washington—ss.

Upon consideration of the petitions for naturalization recommended to be denied, listed on List No. 2552 sheet(s) 1 to dated November 15, 1954, presented in open Court this 15th day of November, A.D., 1954, It Is Hereby Ordered that each of the said petitions, except those petitions listed below, be, and hereby is, denied.

It Is Further Ordered that the recommendation of the designated examiner is disapproved as to the petitions listed below, and each of said petitioners so listed having appeared in person in open Court this.....day of....., 19.., and each having taken the oath of allegiance required by the naturalization laws and regulations, It Is Hereby Ordered that each of them be, and hereby is, ad-

mitted to become a citizen of the United States of America.

It Is Further Ordered that prayers for change of name listed below be and hereby are granted, except as to petition(s) No.....

It Is Further Ordered that petitions listed below be continued for the reasons stated.

* * * * *

By the Court, this 17th day of November, 1954.

/s/ William J. Lindberg,
Judge.

[Endorsed]: Filed in U. S. District Court, Western District of Washington, Northern Division, and entered in Naturalization Docket Nov. 17, 1955.

Form N-486—United States Department of Justice
—Immigration and Naturalization Service.

Original

List No. 2552

NATURALIZATION PETITIONS RECOM-
MENDED TO BE DENIED

To the Honorable the United States District Court
of West. Dist. of Wash., sitting at Seattle,
Washington

R. S. Sullivan, duly designated under the Immigration and Nationality Act, to conduct preliminary examinations upon petitions for naturalization to the above-named Court and to make findings and recommendations thereon, has personally examined

under oath at a preliminary examination, the following ten (10) petitioners, the children named in whose behalf the petitions for naturalization were filed, and their required witnesses, has found for the reasons stated below, that such petitions should not be granted, and therefore recommends that such petitions be denied.

Petition No.—Name of Petitioners—Reason
for Denial:

1. 44248—Clara Dias: Want of prosecution, without prejudice.
2. 44521—Dorotio Ocasion: Unable to read and write in the English language and not exempted from this requirement.
3. 44683—Christine Denos Carkonen: Want of prosecution, without prejudice.
4. 44893—Josette Yolande Yandl Reid: Want of prosecution, without prejudice.
5. 44905—Victoria Androff: Want of prosecution, without prejudice.
6. 45013—Saleem Georges: For lack of knowledge and understanding of the Constitution and our form of Government, without prejudice.
7. 45189—Leonards Rudolfs Bensons: Want of prosecution, without prejudice.
8. 45554—Florence Lillian Flumerfelt. For failure to establish good moral character for the period required by law.
9. 45874—Ferdinand Gaitz: Want of prosecution, without prejudice.

10. 47403—Morris William Jackson: For failure to establish good moral character for the period required by law.

Respectfully submitted November 15, 1954.

/s/ R. S. Sullivan, (Signature of officer in attendance at final hearing)

[Endorsed]: Filed November 17, 1954.

In the United States District Court for the Western District of Washington, Northern Division

Petition No. 45554—List No. 2552

FLORENCE LILLIAN FLUMERFELT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

NOTICE OF APPEAL

To United States of America and to Herbert Brownell Jr., Attorney General, and Charles P. Moriarty, U. S. Attorney:

You and Each of You will please take notice that Florence Lillian Flumerfelt hereby gives notice of Appeal to the United States Court of Appeals for the Ninth Circuit from that certain order made and entered on the 17th day of November, 1954, denying the application of Florence Lillian Flumer-

felt United States citizenship on the ground that she had not established good moral character and from each and every part thereof.

Dated this 13th day of December, 1954.

/s/ JOHN E. BELCHER,
Attorney for Appellant

[Endorsed]: Filed December 14, 1954.

[Title of District Court and Cause.]

APPELLANT'S POINTS ON APPEAL

1. The district court abused its discretion in following the recommendation of the examiner in holding that appellant had failed to establish good moral character.

2. The district court erred in denying appellant admission to citizenship.

/s/ JOHN E. BELCHER,
Attorney for Appellant

Acknowledgment of Service attached.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

Appellant hereby designates the following as the record on appeal herein:

1. Application of appellant for citizenship.

2. Recommendation of examiner denying application.

3. Transcript of record before examiner dated February 9, 1954.

4. Judgment denying application dated November 17, 1954.

5. Transcript of evidence November 15, 1954.

/s/ JOHN E. BELCHER,
Attorney for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed December 29, 1954.

EXHIBIT "A"

In the Case of Florence L. Flumerfelt.

Date: February 9, 1954. Place: Seattle, Washington. Language used: English. Examiner: Ray S. Sullivan and Fay L. Miller. Stenographer: Shirley Bartlein. Person present: Florence L. Flumerfelt.

Examiner Sullivan to Florence Flumerfelt:

Q. Do you solemnly swear that the statements you are about to make in the matter of your petition for naturalization will be the truth, the whole truth and nothing but the truth, so help you God?

A. I do.

Q. Please state your full name.

A. Florence Lillian Flumerfelt.

Q. Have you ever used any other name?

A. Lynn Flumerfelt and Lynn Perry.

Q. How does it happen you used the name Perry?

A. In Los Angeles I took up singing and the woman that taught me suggested that I use the name Perry from Perry Sound. I studied two months or so.

Q. Do you use the name of Perry at all?

A. No, sir.

Q. You were born in Canada?

A. That's right, sir.

Q. When did you come to the United States?

A. April in 1948.

Q. Are you single? A. Yes.

Q. Occupation? A. Waitress.

Q. Where are you employed?

A. The Canton Gardens.

Q. Is the Canton Gardens operated by Chinese?

A. Yes, sir.

Q. Who is the proprietor?

A. Mickey Louie and Frank Chin.

Q. How long have you worked there?

A. I have worked steady since July but work part time for my girl friend.

Q. Where did you work before that?

A. Young China Cafe on Summit North.

Q. Who operates this place?

A. I think it was a Locke fellow.

Q. Where did you work before that?

A. Columns, on University Way.

Q. Is that a restaurant? A. Yes.

Q. Who is the proprietor?

A. Tommy Chinn.

Q. Is he Chinese? A. Yes, sir.

Q. How long did you work there?

A. Only a couple months, three months at the most.

Q. Have you worked at Chinese restaurants during most of your employment here in Seattle?

A. Yes, sir.

Q. You live at 605 Yesler Way?

A. Yes, sir.

Q. How long have you lived there?

A. Since last May.

Q. Where did you live before that?

A. With Mrs. Groves on Belmont North.

Q. How long did you live there?

A. Close to a year and eight months or two years.

Q. Is this address at 605 Yesler Way a hotel?

A. Yes, sir.

Q. Who operates it? A. George Woon.

Q. Is he Chinese? A. I think so.

Examiner Sullivan: I believe Mr. Miller may want to ask some questions.

Investigator Miller to Florence Flumerfelt:

Q. How did you happen to move from 503 Belmont North to 605 Yesler Way?

A. I had been living with a girl friend at Mrs. Groves place and when she left I wasn't working steady and forty dollars is an awful lot for one person. I knew quite a few people at the hotel and they told me the rooms were nice.

Q. What is the name of the hotel?

A. Terrace View.

Q. What people did you know at the hotel?

A. Johnny Dong and James Wong.

Q. How long have you known Johnny Dong?

A. I knew him when working at the Kum Ming Club. The winter before I worked at Column's I worked at the Kum Ming.

Q. When did you first become acquainted with James Wong?

A. I met him when I worked at Columns. He was the one of the managers there.

Q. What does James Wong do now?

A. He is working at Marco Polo.

Q. Where is that?

A. On Fourth Avenue South.

Q. Can't you be more specific? Where is the Marco Polo Cafe?

A. It's out towards South Park on Fourth Avenue.

Q. What is James Wong's Chinese name?

A. Chung, I think it is.

Q. Wong Chung Chang, is that it?

A. I don't know how it is used. I am pretty sure it is Chung.

Q. Where does James Wong actually live?

A. Terrace View Hotel.

Q. What room? A. 208.

Q. What room do you occupy? A. 209.

Q. Are these rooms adjoining? A. Yes.

Q. Do you ever occupy or does James Wong occupy the same room with you? A. No, sir.

Q. Have you ever lived with James Wong as man and wife? A. No, sir.

Q. Never? A. No, sir.

Q. Are there any other white people living in the Terrace View Hotel?

A. There are a lot of white people living there.

Q. Can you name anyone?

A. The maid that is working there is one, but I don't associate with any of them.

Q. Are there any other girls living there?

A. There are some, but I don't know any of them by name.

Q. Do these girls live there or just come there?

A. I don't know. I see a lot of them come. I go to work at seven and five on Mondays, and see very few people. I know there is a blonde lady with a dog.

Q. Can you, for the record, offer any explanation as to why you, a white girl, have associated with the Chinese race since you came to the United States?

A. When I first came to Seattle, Reba, my witness, and I were both broke and the International League sent us looking for a job. I got a job at the Riceland Cafe. I met Ruby Chin, who was my witness, and met other people were were very wonderful to me. And it is through all my Chinese friends that I have gotten my job. I like them and I am well liked. If you have been good to them, there is no reason to say I don't want to see you.

Q. According to your application you have belonged to at least four clubs, two of which are

known to be Chinese drinking and bottle clubs. Therefore, you apparently are well acquainted in and around what is known as Seattle's Chinatown. Do you know what reputation the Terrace View Hotel enjoys in Chinatown?

A. Well, it is classed as a second rate hotel. But as far as hotels are concerned, you know yourself that one hotel is not held for good things or bad.

Q. From the information available to this Service, the Terrace View Hotel is a well known illicit house of prostitution and is very frequently served by "call girls". Are you aware of that reputation?

A. I had heard of things like that. I am telling you, if you are going to look for things like that, if you are that type of woman, men can tell it. I have never been molested up there.

Q. Are you willing to state under oath that you have never served as a "call girl" or prostitute?

A. I certainly am.

Examiner Sullivan: May I ask a question at this point:

Q. What kind of work did you do in Los Angeles? A. Domestic work.

Q. Is that all you did? A. Yes, sir.

Q. What was your reason for joining these so-called Liquor or Bottle Clubs?

A. I certainly enjoy dancing a lot and I went there for that.

Q. Aren't there any other dancing clubs?

A. People suggested I get cards for these clubs.

Q. Do you use intoxicating liquors?

A. I have a drink with anyone.

Q. Have you ever been intoxicated?

A. It all depends what people figure intoxication is. I have never been in a way that I don't know what people are saying to me.

Q. Well, have you ever been, in a one-syllable word, drunk?

A. No, I have never been staggering around.

Q. Have you ever been under the influence of intoxicating liquor?

A. No. I have always known what I was doing.

Q. How often do you frequent these liquor clubs?

A. I don't know if I was down there Christmas—Christmas Eve, I think it was.

Q. Have you been there since Christmas?

A. Not very often. When you work six days a week you don't go drinking very much.

Q. Why did you leave the YWCA?

A. When I came to the United States we went three nights to the YWCA and we found out that Don Hamilton would leave the girls with the bills from selling magazines. They fired Reba because she wasn't making enough money, and gave them a bad time.

Q. Have you ever gone back there for companionship?

A. No, sir.

Q. You prefer to get that at the Liquor Clubs?

A. No, sir. I used to play tennis, but I can't do this now because I hurt my back when I was a little girl. I can't even dance to an excess now.

Investigator Miller to Florence Flumerfelt:

Q. It has been reported to this Service that you

and James Wong have, on occasion, put yourself forward as being man and wife. Is that true?

A. No, sir. I have been going out with Jim for a long, long time to shows, swimming, fishing, catching frogs, with my girl friend and her husband.

Q. Has your association with Mr. Wong always been platonic? A. Yes, sir.

Q. Do you know what I mean by that?

A. Yes.

Q. Have you ever had sexual relationship with Jimmy Wong?

A. Everybody is human, aren't they.

Q. Will you answer that question yes or no.

A. Yes, I have.

Examiner Sullivan to Florence Flumerfelt:

Q. Do you have any roommate in this place where you now stay? A. No, sir.

Q. How much room rent do you pay a month?

A. Twenty-five dollars.

Q. You have given as your last witnesses, Mr. and Mrs. Robert Caupro. Are they citizens of the United States? A. Yes, sir; I am sure they are.

Q. What is the occupation of Robert Caupro?

A. He is a jeweler, I think.

Q. What is your acquaintanceship with these people?

A. I bought a watch there and took their children out for walks.

Q. Do you see both of them there?

A. Yes, sir. They both go out separately because they can't leave the work at the jewelry shop. They

had a friend of theirs that wanted me to work for them. I don't know what happened, whether it was the stairs they didn't think I could climb, or what.

Q. You have previously given the names of two witnesses, Mr. and Mrs. Schwartz. What was your acquaintanceship with them?

A. As a domestic.

Q. For how long?

A. I worked in Canada for them before I got my papers. I started with them at the opening of the season in Canada up at their summer cottage.

Q. Are they Canadian?

A. No, they are American citizens but they have a cottage in Canada.

Q. What kind of business is he in?

A. I don't know now, but they had a furniture store. They were planning to get one in Los Angeles.

Q. Do you have anyone coming in to give a deposition for you?

A. No, sir.

I certify that this a true and correct transcript of my shorthand notes.

/s/ Shirley Bartlein,
Stenographer.

[Endorsed]: Filed December 29, 1954.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated between the parties hereto by their respective counsel that the following docu-

ments are a part of the record herein and may be transmitted to the Court of Appeals for the Ninth Circuit.

1. Transcript of record before examiner dated Feb. 9, 1954.

2. Recommendation of examiner.

3. Judgment denying application, dated Nov. 17, 1954.

4. Application of appellant for citizenship.

5. Order extending time for filing transcript of evidence.

Dated this 6th day of January, 1955.

/s/ JOHN E. BELCHER,

Attorney for Appellant

/s/ F. N. CUSHMAN,

Asst. U. S. Attorney for

Respondent

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

**ORDER EXTENDING TIME FOR FILING
TRANSCRIPT OF EVIDENCE**

Upon the oral application of counsel for appellant, and good cause therefor being shown it is

Ordered that the time for filing the transcript of the evidence in the above entitled cause be and

the same is hereby extended thirty days from this date.

Done in open court this 6th day of January, 1955.

/s/ WILLIAM J. LINDBERG,
U. S. District Judge

Presented by:

/s/ JOHN E. BELCHER,
Attorney for Appellant.

Approved:

/s/ F. N. CUSHMAN,
Assistant United States Attorney.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of subdivision 1 of Rule 10, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, as amended and Designation and Stipulation of Counsel as filed herein, I am transmitting herewith the following original papers dealing with the action as the record on appeal herein from the Order Denying Petition for Citizenship entered November 17, 1954, to the United States Court of Appeals for the Ninth Circuit, to wit:

1. Petition for Citizenship No. 45554 filed June 1, 1953. (Certified copy.)

2. Order Denying Petition for Citizenship filed Nov. 17, 1954 (attached thereto Examiner's Recommendation that Petition be denied).

3. Notice of Appeal by Petitioner filed December 14, 1954.

4. Appellant's Points on Appeal filed Dec. 29, 1954.

5. Appellant's Designation of Record on Appeal (attached to which is Exhibit "A"—Department hearing).

6. Stipulation as to Record on Appeal filed Jan. 6, 1955.

7. Order Extending Time for Filing Transcript of Evidence filed Jan. 6, 1955.

8. Reporter's Transcript of Evidence of Proceedings held Nov. 15, 1954, filed Jan. 27, 1955.

I certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record of appeal herein on behalf of appellant, to wit: Notice of Appeal \$5.00, and that this amount has been paid to me by the attorney for the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 1st day of February, 1955.

[Seal]

MILLARD P. THOMAS,
Clerk

/s/ By TRUMAN EGGER,
Chief Deputy

In the District Court of the United States, Western District of Washington, Northern Division

No. 45554

In re Petition of FLORENCE LILLIAN FLUMERFELT, Petitioner for Naturalization.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled and numbered cause had before the Honorable William J. Lindberg, a United States District Judge, at Seattle, Washington, on the 15th day of November, 1954.

Appearances: John E. Belcher, Suite 706 Jones Bldg., 1331 Third Ave., Seattle 1, Wash., appeared for and on behalf of the Petitioner; and Raymond S. Sullivan, Naturalization Examiner, The Immigration and Naturalization Service, 815 Airport Way, Seattle, Wash., appeared for and on behalf of the Department.

Whereupon, the following proceedings were had, to-wit: [1*]

The Court: Number 45554, Florence Lillian Flumerfelt.

Mr. Belcher?

Mr. Belcher: I have nothing further to say than that already contained in the memorandum which I have filed and served upon Mr.—on the Examiner.

I realize that citizenship is a privilege and not a right.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

I realize also, if your Honor please, that the question presented here is one involving—with some discretion for the Court—in my humble opinion, at least, one offense which does not constitute adultery.

Mr. Sullivan: You don't concede that there was just one act? We are going to show that there was more than one act of immorality.

Mr. Belcher: That is all you showed in the record.

Mr. Sullivan: I think you misunderstood the testimony. I think she should go on the stand and testify.

Mr. Belcher: I will be very glad to call her. [2]
Come forward.

The Court: The Government is opposing this petition upon the ground that during the statutory period she has failed to establish good moral character?

Mr. Sullivan: That is correct.

The Court: And you are resisting the recommendation; and, of course, it would be necessary to put on proof.

Mr. Sullivan: Should I question first and then if you have questions, you may?

Mr. Belcher: I will object to that kind of procedure. We are here on the testimony——

The Court: (Interposing) Mr. Sullivan, the Petitioner is seeking citizenship and if Mr. Belcher puts her on, he may proceed with the examination and then the Government may cross examine.

Mr. Sullivan: Very well, sir. [3]

FLORENCE LILLIAN FLUMERFELT

upon being called as a witness for and on behalf of the Petitioner, and upon being first duly sworn, testified as follows:

Direct Examination

Mr. Belcher: This is direct examination?

The Court: That is right.

Q. (By Mr. Belcher): State your name, please.

A. Florence Lillian Flumerfelt.

Q. And you are an applicant for citizenship?

A. Yes, sir.

Q. When did you come to the United States?

A. April, 1948.

Q. From where? A. Windsor, Ontario.

Q. Where were you born?

A. In Paris Island, Ontario.

Q. In the Dominion of Canada?

A. That is right.

Q. Have you been in the United States at all times since the date you were admitted?

A. I made one trip to B. C.

Q. How long? [4]

A. Just for dinner and right-back.

Q. So that you have been in the United States consistently with one—with that one exception since the year 1948? A. That is right.

Q. And where have you lived in that period of time?

A. In Los Angeles, Detroit, and here in Seattle.

Q. And when did you come to Seattle?

A. I think it was '50.

(Testimony of Florence Lillian Flumerfelt.)

Q. 1950? A. Yes.

Q. When did you file your application for citizenship in the United States?

A. It was five years after 1948. It would be 1952, I think. No, '53.

Q. What has been your occupation since you have lived in the United States?

A. I was domestic help when I first came over here and waitress.

Q. And where have you worked as a waitress?

A. I worked at the Riceland Cafe.

The Court: Is that Seattle?

The Witness: Yes, sir. [5]

Q. (By Mr. Belcher): Riceland Cafe in Seattle; is that run by Japanese? A. No.

Q. Chinese? A. Chinese.

Q. Where else have you worked?

A. Jade Pagoda.

Q. And is that run by Chinese?

A. Yes.

Q. And where else? A. Young China.

Q. Is that also a Chinese restaurant?

A. Yes.

Q. Now, any other place?

Q. Yes, two others; three others now.

Q. And where was that?

A. Columns, on University Way, and Canton Gardens and Malstrom's. Columns and Canton are Chinese but Malstrom's is not.

Q. When you first came to Seattle did you have work?

(Testimony of Florence Lillian Flumerfelt.)

A. I was working with the International Readers' League, and it is a magazine crew and we were going from city to city and state to state. [6]

Q. How did you happen to find the job as a waitress in a Chinese restaurant?

A. I went down and I got my first job at the Old Armory down at the waterfront.

Q. And did you come to Seattle with somebody else?

A. I was traveling with this crew, and this—one of my witnesses and I at the time both quit the crew here in Seattle and stayed on in Seattle and she is still in Seattle also.

Q. And you appeared before Ray S. Sullivan and Fay L. Miller, Examiners for the Bureau of Naturalization, here in Seattle, on the 9th day of February, 1954, did you?

A. I don't know the exact date but I did appear.

Q. Do you recall having appeared before these two gentlemen? A. Yes.

Q. I don't think there is any dispute that that was the 9th of February, 1954, and were you sworn? As a witness?

Q. Yes, sir. No, not as a witness.

Q. And did you testify in your own behalf in that hearing? [7] A. Yes, sir.

Q. And were you, or were you not, interrogated by Mr. Ray S. Sullivan, the gentleman seated at the table here? A. Yes, sir.

Q. And also by Fay L. Miller?

A. Yes, sir.

(Testimony of Florence Lillian Flumerfelt.)

Q. And did you at that time make a full and complete disclosure of your conduct?

A. I did, sir.

Q. Since you have been in the City of Seattle?

A. Yes.

Q. You did admit upon interrogation by Mr. Miller that you had had sexual relations on one occasion with a Chinese? A. Yes.

Q. In Seattle? A. Yes.

Q. Who was that Chinese?

A. James Wong.

Q. And where did you meet him?

A. He was working at one of the places I was working at.

Q. What were the circumstances under which [8] you had those relations with this Chinese?

A. Well, as I had said before, I had been quite ill, and I had just found out the year or so before that my back had been broken when I was a child and my legs and arms were paralyzed on me and it was during one of these times—you know how you get—well, when you start bawling and people try to, I don't know, comfort you one way or another and before you know it something happens. You know.

Q. And where did this happen?

A. I am sorry, it happened in the car.

Q. You were interrogated quite fully by both of these examiners as to whether or not you had practiced prostitution in the State of Washington since you came here? A. Yes.

(Testimony of Florence Lillian Flumerfelt.)

Q. Some question was raised as to the respectability of the hotel in which you were living and is it not true that by innuendo these examiners attempted to establish this as a house of ill repute?

Mr. Sullivan: I object to his leading questions. He is still on direct examination.

The Court: I think the question stated is objectionable. [9]

Q. (By Mr. Belcher): (Continuing) I will ask you whether you have at any time since you came to the United States of America, and since you have filed your application for citizenship—whether or not you have practiced prostitution?

A. No.

Q. I will ask you if you had sexual relations with any other person, either for pleasure or for hire, on any other occasion?

A. No.

Q. Where do you live now, Miss Flumerfelt?

A. Belmont North.

Q. And where were you living at the time that this act took place?

A. At Belmont North.

Q. And what was the name of the place in which you had been—what was the name of the place on Belmont Avenue?

A. Well, it is a rooming house.

Q. It is a rooming house?

A. Yes.

Q. Had you previously lived at another address?

A. Yes. [10]

Q. Where was that?

(Testimony of Florence Lillian Flumerfelt.)

A. Up on University Way. It was also a rooming house.

Q. Are you addicted to the excessive use of intoxicating liquors? A. No.

Q. Have you ever been in a brush with the law force?

A. I have never been in a brush with the law under any circumstances except this.

Q. Now, how long had you known this Chinese gentleman before this act that you spoke of took place?

A. I think it was just about a year.

Q. About a year? A. Yes.

Q. Is this Chinese gentleman, whose name is Wong—— A. (Interposing) Yes.

Q. (Continuing) ——an American citizen?

A. Yes.

Q. So far as you know does he have any criminal record? A. Not that I know of.

Q. You are not married? [11]

A. No, I am not.

Q. Did you know at the time this infraction took place whether or not the gentleman was married?

A. No, I didn't. I didn't find that out until quite a while afterwards.

Q. And you say that this is the only occasion?

A. Yes.

Q. Upon which this indiscretion took place?

A. Yes, sir.

Mr. Belcher: You may inquire.

(Testimony of Florence Lillian Flumerfelt.)

The Court: The Court will take about a ten minute recess.

(Whereupon, at 3:17 o'clock p.m., a recess was had in the within-entitled and numbered cause until 3:29 o'clock p.m., November 15, 1954, at which time, Counsel heretofore noted being present, the following proceedings were had, to-wit:)

Mr. Belcher: With the Court's permission, may I use the lectern while he is examining the witness?

The Court: You want to use the lectern?

Mr. Belcher: Yes, while Counsel is examining the witness. [12]

The Court: If it doesn't interfere with Mr. Sullivan, it is all right.

Mr. Belcher: That is what I mean.

(Whereupon, the Court conferred with other counsel relative to matters pending and the following proceedings were then had, to-wit:)

The Court: You have completed your direct examination, Mr. Belcher?

Mr. Belcher: Yes.

The Court: You may proceed.

Cross Examination

Q. (By Mr. Sullivan): Miss Flumerfelt, what is your present occupation?

A. I am—I manage sundries at nights in Malstrom's Drug Store; sundries on Bellevue and Pine.

Q. How long have you been employed there?

A. Since July.

(Testimony of Florence Lillian Flumerfelt.)

Q. Where are you living?

A. 503 Bellmont North.

Q. How long have you lived there?

A. It is the same lady I have lived with some years back.

Q. When? [13]

A. It is the same lady I lived with before.

Q. Since when, preceding this date?

A. May or June.

Q. And where did you live before that?

A. 605 Yesler Way.

Q. How long were you at that place?

A. A year.

Q. That is known as the Terrace View Hotel?

A. That is right.

The Court: What year was that?

The Witness: 1953.

The Court: That was for a year, in 1953 to 1954?

The Witness: That is right, sir.

Q. (By Mr. Sullivan): And what was the number of your room there? A. 218, or 208.

Q. Who occupied room 209?

A. Mr. James Wong.

Q. And how long had he occupied that room?

A. A year or so.

Q. During all the time you were there?

A. I think so.

Q. You said you were there about a year? [14]

A. Yes.

Q. And was that an adjoining room to your room? A. It had a door between.

(Testimony of Florence Lillian Flumerfelt.)

Q. But it adjoined and there was a door between?

A. There was a door between, yes.

Q. Was there a bolt on the door?

A. There was a lock.

Q. On which side? A. On my side.

Q. On your side? A. Yes.

Q. Not on his side?

A. I don't know. I think there was a bolt on his side.

Q. And had you been going with this James Wong during that period, during that year?

A. Yes, we were good friends.

Q. Now, you stated that there was only one occasion when you had any illicit relations with this James Wong, is that right? A. Yes, sir.

Q. And when was that?

A. Around November, two years ago; in [15] November, two years ago.

Q. Was that while you were living at this room 208? A. No.

Q. Did you have any illicit relations with him while you and he were occupying those adjoining rooms? A. No, sir.

Q. Did he ever go into your room?

A. He knocked on the door and called me.

Q. Did he come in? A. Not by himself.

Q. He never came in alone? A. No, sir.

Q. Did you ever go into his room?

A. No, sir.

Q. You never did?

(Testimony of Florence Lillian Flumerfelt.)

A. As a matter of fact, the only time we would get a chance to see each one would be when the maid would be making up the rooms because I worked one shift and he would work another.

Q. He is a married man, is he?

A. Yes, sir.

Q. And did you know that he was married?

A. I only found that out just a couple of [16] years ago.

Q. A couple of years ago? A. Yes, sir.

Q. And was that before you had this illicit relationship with him? A. No, sir.

Q. How long had you known him when this act occurred? A. About a year.

Q. About a year? A. Yes.

Q. You have known him about three years then, have you? A. Yes.

Q. And you lived in this hotel in adjoining rooms for about a year, is that right?

A. Yes, sir.

Q. Now, when you were questioned in our office you were asked this question:

“Have you ever had sexual relations with Jimmy Wong?

And you answered:

“Everybody is human, aren’t they?”

Is that correct?

A. Yes, sir. [17]

Q. And you were asked this question:

“Will you answer that question ‘yes’ or ‘no’?”

And you answered then:

(Testimony of Florence Lillian Flumerfelt.)

"Yes, I have."

Is that correct?

A. That is right.

Mr. Belcher: What page is that, Mr. Sullivan?

The Court: Mr. Belcher is asking you the page.

Mr. Sullivan: The page?

Mr. Belcher: Yes, what page is that in the examination?

Mr. Sullivan: At the bottom of page five.

Q. (By Mr. Sullivan): Do you belong to any of what they call so-called bottle clubs?

A. Yes, sir. I used to work for one.

Q. And how many of these clubs have you belonged to?

A. I did have cards for three.

Q. How many?

A. I did have cards for three.

Q. You had cards for three? [18]

A. Yes.

Q. And over how long a period were you a member of these bottle clubs?

A. I worked at the King Ming Club and I had my card from there.

Q. What is the nature of these bottle clubs?

A. You take your own bottle and go in with a group of people and go in and dance.

Q. You take your own liquor? A. Yes.

Q. And did you do that? A. Yes.

Q. Did you know that this Terrace View Hotel had a reputation of being a call house, what they call a call house, for prostitution?

(Testimony of Florence Lillian Flumerfelt.)

A. You had told me that. That is the only time that I had knew about it.

Q. What?

A. You told me that and that is the only time that I knew about it; and what you told my friends.

Q. Well, you were asked this question on that occasion:

A. Yes, I know the question.

Q. "From the information available to this Service [19] the Terrace View Hotel is a well-known illicit house of prostitution and is frequently served by call girls. Are you aware of that reputation?"

And you answered:

"Yes, I had heard of things like that."

A. Yes; you went to some of my friends and they came up and asked me if it were true, when you were investigating me.

Mr. Sullivan: I believe that will be all, your Honor.

Redirect Examination

Q. (By Mr. Belcher): How long after you heard that this Terrace View Hotel had that reputation did you move therefrom?

A. It was during the time that Mr. Sullivan and Mr. Miller was investigating me, and I left there.

Q. Is that the only time that you heard it had the reputation of being a house of prostitution, or call girl house?

A. Yes, sir.

Q. And you have since moved from that location?

A. Yes, sir. [20]

(Testimony of Florence Lillian Flumerfelt.)

Mr. Belcher: I think that is all.

(Witness excused.)

Mr. Sullivan: I think we will call Mr. Miller.

Will you take the stand? [21]

FAY L. MILLER

upon being called as a witness for and on behalf of the Department, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Sullivan): State your name and occupation?

A. My name is Fay L. Miller and I am an investigator for the United States Immigration Service.

Q. As such did you conduct an investigation in the case of the petitioner here, Florence Lillian Flumerfelt?

A. I did, sir.

Q. Did you call up the Terrace View Hotel where she had been rooming at one time?

A. Yes, on two occasions.

Q. And about when was it that you called her, do you recall?

A. Well, one occasion was shortly before her appearance at the office, and one was that same day.

Q. And that was in February, 1953, the day that the testimony was taken?

A. The day of the testimony, I think, was in [22] February of this year.

(Testimony of Fay L. Miller.)

Q. About what time did you go up there?

The Court: Just a moment. Did you finish the answer?

A. (Continuing) February, 1954.

Q. (By Mr. Sullivan): Yes, February 9, 1954.

A. That would be approximately correct.

Mr. Belcher: February 9th what?

Mr. Sullivan: 1954.

Q. (By Mr. Sullivan): About what time of the day did you go up to this hotel?

A. Well, to the best of my recollection it is that Miss Flumerfelt was in the office about approximately 11:00 o'clock, or 10:30 or 11:00 o'clock in the morning and immediately following the interrogation of Miss Flumerfelt at the office I proceeded to the Terrace View Hotel, so that it would be approximately 11:00 o'clock in the morning.

Q. Did you have another investigator with you?

A. Yes, sir.

Q. What was his name?

A. Harold Halverson. [23]

Q. Did you go to the room occupied by the petitioner there?

A. Yes. We went to the room occupied by James Wong.

Q. I see. Were these rooms adjoining; that is, the petitioner's and James Wong's rooms adjoining?

A. They were.

Q. Was there a door between the two?

A. Yes, sir.

Q. Just describe to the Court what the condi-

(Testimony of Fay L. Miller.)

tion of the door was as to any lock or bolt, or anything of that kind.

A. Well, we rapped on the door of James Wong, which, I believe, was room 208 or 209. I have forgotten the difference in numbers. It took him a few minutes to come to the door. He came to the door in his bathrobe and we walked in and told him who we were and showed him our credentials and talked with him.

He said he had just gotten up and that he had to go to work at 11:30.

The bed which was in his room very obviously had not been slept in. During the course of our talking to Mr. Wong I noticed this door that [24] seemed to lead out of his room and on the side next to Mr. Wong's room was a bolt, just a sliding bolt, on this door. I reached over and slid the bolt and the door immediately opened into the petitioner's room. There was no lock from the other side. At least, it was not locked.

Q. Did you open the door?

A. I opened the door, yes.

Q. And did you question Mr. Wong at that time?

A. Yes, we did.

Q. Just in substance, what were your questions?

A. Well, principally, we were interested in who he was and what his immigration status was and whether he was a married man or not, and he proceeded to deny that he had occupied any other room than his own but it was so obvious he had just gotten up.

(Testimony of Fay L. Miller.)

Mr. Belcher: That is objected to.

Mr. Sullivan: We will strike that.

Q. (By Mr. Sullivan): Did you question him about Miss Flumerfelt?

A. We did not on that occasion because he [25] agreed to appear at the office that afternoon and give a sworn statement, and he did not appear except with an attorney and they refused to give a statement.

Q. Is he a citizen of the United States?

A. He is.

Q. Naturalized?

A. I believe he was born abroad of American parents, if my recollection is right.

Q. Do you know what the reputation of this hotel known as the Terrace View Hotel is?

A. Well——

Q. (Interposing) Just say “yes” or “no”.

A. Yes.

Q. Then tell the Court what the reputation of the hotel is.

A. Well, it has the reputation of being a call house.

Mr. Belcher: Just a moment. Where did you get this information?

The Court: Just a moment. Do you wish to examine on voir dire?

Mr. Belcher: I do, yes, your Honor.

The Court: This has to do with your knowledge. You stated you knew the reputation and [26] Mr.

(Testimony of Fay L. Miller.)

Belcher is examining you as to source of that knowledge.

Mr. Belcher: Where did you get that knowledge from?

The Witness: From two different sources.

Mr. Belcher: Hearsay, wasn't it, pure and simple? You don't know of your own knowledge, do you?

The Witness: I do not know of my own knowledge.

Mr. Belcher: That is all.

Mr. Sullivan: Can he testify from what source he got it?

The Court: You can continue on voir dire.

Mr. Sullivan: All right.

Q. (By Mr. Sullivan): From what source did you get this information?

A. One was from a dispatcher of the taxi-cab company who stated that they have on many occasions dispatched taxis with girls to the Terrace View Apartment Hotel; and one was from a Chinese in Chinatown who has acted as an informer to this [27] Service whose name I can not disclose.

Mr. Sullivan: I believe that is all, your Honor.

Cross Examination

Q. (By Mr. Belcher): Did you know, Mr. Miller, that tried in this very court room was a call girl for practicing prostitution only three years ago where witnesses from the Olympic Hotel, who were bell hops, were panderers for this woman who was

(Testimony of Fay L. Miller.)

a call girl and practiced prostitution in the Olympic Hotel?

Would you say that that would brand the Olympic Hotel as a place where call girls held a rendezvous?

A. Do I have to answer that? It is a matter of judgment.

The Court: The Court will sustain an objection to the question.

Q. (By Mr. Belcher): You personally have no knowledge, personal knowledge, of whether or not there have been call girls operating out of the Terrace Hotel? A. No, I do not.

Q. All that you know about it is what somebody else told you? [28]

A. That is right, sir.

Q. Yes; now, did you say anything to Miss Flumerfelt about going up there to this room to examine it? A. No.

Q. This occurred after you had conducted this examination of her down in your building on Airport way? didn't it? A. That is right.

Q. Did you inform her—why didn't you ask her to go with you, to go up and make this examination? A. Why didn't I ask her?

Q. Yes, why didn't you ask her? You wanted to be fair about it, didn't you?

A. I saw no point in asking her.

Q. You wanted to be perfectly fair about it, didn't you? A. Sure, yes, sir.

(Testimony of Fay L. Miller.)

Q. And it is your opinion that that is the act of a fair man seeking the truth? A. Yes.

Mr. Sullivan: I object to that line.

The Court: The Court will sustain the objection. [29]

Mr. Belcher: That is all.

Mr. Sullivan: One more question.

Redirect Examination

Q. (By Mr. Sullivan): When you went up to this hotel were you inspecting her room or James Wong's room?

A. James Wong's room. We never set foot inside her room.

Mr. Sullivan: That is all.

Recross Examination

Q. (By Mr. Belcher): Now, then, Mr. Miller, you are familiar with the rules of your own Department, are you?

A. I believe I am, sir.

Q. And the Decisions of the Commissioner of that Department?

A. I would say fairly so.

Mr. Sullivan: I object to this.

The Court: What is the purpose of this, Mr. Belcher?

Mr. Belcher: To show the policy of the Department.

The Court: If you want to make him your own witness, but this is cross examination.

(Testimony of Fay L. Miller.)

Mr. Sullivan: I object, your Honor. [30]

The Court: Objection sustained.

Mr. Belcher: Very well. I will make him my own witness.

The Court: You call him, Mr. Belcher, now as your own witness?

Mr. Belcher: Yes.

Direct Examination

Q. (By Mr. Belcher): Are you familiar with the Decisions of your own Department, the rulings of your own Department, with reference to situations of this type?

A. Reasonably so. Put it that way.

Q. Yes.

A. I am not in a policy position.

Q. I will hand you——

Mr. Sullivan: I think it is argumentative.

The Court: Would you advise what the purpose of this testimony is?

Mr. Belcher: The purpose is to show the policy of the Department which is within the personal knowledge of this witness.

The Court: What policy?

Mr. Belcher: The policy with respect [31] to very situations of this nature.

The Court: In what respect? If you will explain, if it isn't something you have to keep secret; if you will explain it so that I get some idea what you are attempting to do.

Mr. Belcher: It is a ruling made by the Im-

(Testimony of Fay L. Miller.)

migration Court of Appeals which sets the policy of that Department.

The Court: Tell me what it is. Let me know what you are getting to and I assume if there is a policy involved that has a bearing the Court should be advised of it, should it not?

Mr. Belcher: Yes. And it sets the policy of the Department, if your Honor please, on admissions of an alien to the United States to visit the fiance, a sailor, in the United States Navy, that they had engaged in sexual relations in Canada and she admitted that she intended to continue those relations in this country and she was excluded by the Board of Inquiry and in considering the case the majority of the Board of Immigration Appeals found the alien admissible as a visitor.

Mr. Sullivan: That is an entirely different case. That is deportation. This is naturalization. [32]

Mr. Belcher: It is the same.

The Court: The Court will sustain objection to the question.

Mr. Sullivan: I object, your Honor.

Mr. Belcher: That is all.

Mr. Sullivan: That is all, your Honor.

(Witness excused.)

Mr. Sullivan: That is all.

The Court: It seems to me in this case, Mr. Belcher, there is sufficient question raised that the burden is with the Petitioner.

The Court would not grant the application on the showing made now.

Mr. Belcher: I beg pardon?

The Court: The Court would not grant petition for citizenship on this showing, unless there is a more affirmative showing of good moral character. I think a question has been raised and the Court at this time would not grant the petition.

Mr. Belcher: Very well, your Honor.

The Court: The Petition is denied without prejudice to being renewed on a subsequent date.

(Whereupon, hearing in the within-entitled cause was concluded.) [33]

[Endorsed]: Filed January 27, 1955.

[Endorsed]: No. 14641. United States Court of Appeals for the Ninth Circuit. Florence Lillian Flumerfelt, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: February 2, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14641

FLORENCE LILLIAN FLUMERFELT,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION

Appellant hereby adopts in this court its points
on appeal and designation of the record filed in the
District Court.

/s/ JOHN E. BELCHER,
Attorney for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed February 9, 1955. Paul P.
O'Brien, Clerk.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

FLORENCE LILLIAN FLUMERFELT,
Appellant

VS.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANTS OPENING BRIEF

JOHN E. BELCHER
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Seattle 1, Washington

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INDEX

	Page
ARGUMENT	7
POINTS ON APPEAL.....	3
STATEMENT	2
THE EVIDENCE.....	4
THE LAW.....	6

TABLE OF CASES

<i>Application of Barug</i> , 76 F. Supp. 607.....	7
<i>Estrin v. U. S.</i> , 80 F. (2d) 105.....	13
<i>Hanson v. Haff</i> , 291 U.S. 559.....	10
<i>In re Anzalone</i> , 107 F. Supp. 770.....	10
<i>In re Poali</i> , 49 F. Supp. 128.....	14
<i>Petition of Gani</i> , 86 F. Supp. 683.....	14
<i>Petition of Rudder</i> , 159 F. (2d) 695.....	13
<i>Schmidt v. U. S.</i> , 177 F. (2d) 450.....	12
<i>State v. Astin</i> , 106 W. 336.....	8
<i>State v. La Bounty</i> , 64 W. 415.....	8
<i>State v. Wheeler</i> , 93 W. 538.....	9

PUBLIC LAWS

414 - 66 Stat. 242.....	5
-------------------------	---

REMINGTON REVISED STATUTE

Sec. 2457.....	8
----------------	---

UNITED STATES CODE ANNOTATED

Page

T. 28, Sec. 1427(a)(3)..... 7

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

FLORENCE LILLIAN FLUMERFELT,
Appellant

VS.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANTS OPENING BRIEF

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court is conferred by the provisions of Sec. 1331, Title 8 U.S.C.A., and of this court by Sec. 1291, Title 28, U.S.C.A.

STATEMENT

This is an appeal from the order of the district court denying appellant's petition for citizenship, upon recommendation of a designated examiner, for alleged failure to establish good moral character for the period required by law. (R. 7, Sec. 9).

Appellant, a Canadian citizen, born September 4, 1927 at Orrville, Ontario, Canada was admitted to the United States for permanent residence at Detroit, Michigan April 5, 1948, filed in the district court her petition for naturalization (Alien Registration No. A 6899534) on June 1, 1953 (R. 3-6 with the affidavits of two American citizens as witnesses, to-wit: Ruby Chin Lew, a stenographer, residing in Seattle and Reba Parker, an ice cream packer, residing in Seattle, who each swore, on oath, they had been acquainted with appellant since May 1949 and March 1949, and that each had personal knowledge that appellant is and has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States (R. 5, 6).

On February 9, 1954, at Seattle appellant appeared before Examiner Sullivan and Miller at the Immigration Station, Seattle and was examined under oath (R. 12-20).

During the examination appellant frankly admitted that she had *on one occasion* in November 1952 had sexual relations with one James Wong (R. 34) an American citizen of Chinese extraction. The examiner recommended denial of the appellant's petition on sole ground — "For failure to establish good moral character for the period required by law" (R. 8, No. 8, 45554).

Appellant was accorded a hearing in the District Court November 15, 1954, at which she was sworn on oath and testified in her own behalf, and fully explained the circumstances under which this *one and only one* indiscretion occurred (R. 24-38).

The District Judge sustained the recommendation of the examiner, and by an order on a printed form containing nine other petitions, denied the petition of appellant (R. 7).

From this indefinite order, appellant filed her notice of appeal (R. 10) December 14, 1954.

APPELLANT'S POINTS ON APPEAL

1. The District Court abused its discretion in following the recommendation of the Examiner in holding that appellant had failed to establish good moral character.
2. The District Court erred in denying appellant admission to citizenship.

THE EVIDENCE

Appellant was examined under oath at Seattle February 9, 1954 by Examiners Ray S. Sullivan and Fay L. Miller.

In the course of her examination she stated she had been known by and had used the name of Lynn Perry. She was asked:

Q. How does it happen you used the name Perry?

A. In Los Angeles I took up singing and the woman that taught me suggested that I use the name Perry from Perry Sound. I studied two months or so. (R. 13).

Q. Do you use the name Perry at all?

A. No, sir. (R. 13).

Appellant's occupation has been that of waitress (R. 13) but she is presently going to school studying hairdressing and most of her years of employment as a waitress has been in Chinese restaurants. (R. 13-14).

Mr. Miller in his examination of petitioner undertook to develop grounds to establish lack of "good moral character" and by inuendo and suggestion attempted to develop that petitioner was a prostitute and that the place where she lived was a place where people of questionable character lived and congregated.

She was asked this question by Mr. Miller:

Q. Can you, for the record, offer any explanation

as to why you, a white girl, have associated with the Chinese race since you came to the United States? (R. 16).

- A. When I first came to Seattle, Reba, my witness, and I were both broke and the International League sent us looking for a job. I got a job at the Riceland Cafe. I met Ruby Chin, who was my witness, and met other people who were wonderful to me. And it is through all my Chinese friends that I have gotten my job. I like them and I am well liked. If you have been good to them, there is no reason to say I don't want to see you. (R. 16).

She was asked:

- Q. Are you willing to state under oath that you have never served as a "call girl" or prostitute?

- A. *I certainly am.* (R. 17).

Appellant frankly admitted having had sexual relations with a Chinese male on one occasion only.

Based upon this record, Mr. Sullivan on June 15, 1954 sent notice to petitioner of his proposed recommendation of denial of her petition for naturalization "*For failure to establish good moral character for the period required by law.*"

THE LAW

Sec. 316(a) of Public Law 414.66 Stat. 242 in part provides:

- (3) “* * * during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.”

In the petition for naturalization on page 2 thereof (18) we find this:

“The law provides that no person shall be regarded as a person of good moral character who, during the period of residence required for naturalization, is or was an *habitual drunkard*; has *committed adultery*; *derived income from illegal gambling*; *has given false testimony* for the purpose of obtaining benefits under the immigration and naturalization laws; is or was a polygamist or practiced or advocated polygamy; *is or was a prostitute, or engaged in or received support or the proceeds from prostitution* or procured or imported or attempted to procure or import persons for prostitution or any immoral purposes or who came to the United States to engage in any other unlawful commercialized vice * * *; who knowingly and for gain encouraged or aided any alien to enter the United States illegally; who has committed a crime involving moral turpitude; or is or has been an illicit trafficker of narcotic drugs.”

After setting forth the above, the form then poses this question: “Have you at any time, either within or outside the United States, ever been or ever committed any of these things or acts? To which petitioner answered “No”.

ARGUMENT

This case is governed by the law in effect at the time of the filing of appellant's petition on the 1st day of June 1953 (R. 3-6), to-wit Sec. 1427(a)(3), Title 8 U.S.C.A., which reads:

"No persons, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner * * * (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

We are here concerned only with the question whether appellant is a person of "good moral character."

The statute does not precisely define that term.

At least one district court in California has said that the term "good moral character" is not a term of technical legal connotation, but it had to be viewed in the light of the standards of society and the conduct of average men of the community in which alien seeking naturalization resided.

Application of Barug (D.C. Cal. 1948) 76 F. Supp. 607.

The appellant frankly admitted in her examination in February 1954 that she had had a single act

of sexual intercourse with a certain American citizen of Chinese extraction (R. 29).

Was that adultery?

Under the laws of the State of Washington adultery is a crime. The statute Rem. Rev. Stat. Sec. 2457 provides:

“Wherever any *married person* shall have sexual intercourse with any person other than his or her lawful spouse *both such persons shall be guilty of adultery* * * *”

(Cited in 51 Wash. 572, and 64 Wash. 416, 106 Wash. 336, 339, 112 Wash. 694).

Appellant did not know when this single act took place or that the other person was married (R. 31).

Appellant is a *single woman* and therefore does not come within the purview of the statute.

In the Washington case of *State v. LaBounty*, 64 Wash. 415 and in *State v. Astin* (1919) 106 Wash. 336 it was held that the intent of the Legislature is to regard adultery as a crime against the *husband or wife* rather than a crime against society, leaving it to the husband or wife to condone the offense, unembarrassed by the publicity incident to the prosecution by the officers of the State.

In the Astin case it was held that no prosecution for adultery shall be commenced except on complaint

of the injured spouse, but such spouse, having made the complaint, has no right to dismiss it, or control the prosecution. Here, however, there is no evidence of prosecution.

The Washington court has held also, that *marriage is an essential element* of the crime and cannot be inferred from the circumstances.

State v. Wheeler (1916) 93 Wash. 538.

In the Department of Justice, Immigration and Naturalization Service "Monthly Review, Vol. VI, No. 5, November 1948 at page 69 under G-M-M A. 6816388, B. 1. A., 4/20/46 we find this

"Immoral purpose — Entry for—

- (1) An alien coming to the United States for two days to visit her fiance, with whom she had been engaged in sexual relations in this country, cannot be found to be coming to this country to live in a state of concubinage because of the time element involved and consequently is not excludable as entering for an immoral purpose.
- (2) Where an alien's primary reason in entering is to visit a fiance and only incidentally to engage in sexual activities, she is not excludable as one entering for an immoral purpose."

In passing upon "moral character" of petitioner for naturalization courts have taken a liberal view of sexual behavior.

In *re Anzalone* (N.J.) 107 F. Supp. 770.

The Supreme Court of the United States, in the case of *Hanson v. Haff*, 291 U.S. 559 (1954) held that the words "immoral purpose" as used in Section 3 of the Act of February 5, 1917 relate to activities which are of like character with prostitution. *It went on to say that "extra marital relations" short of concubinage, fall short of that description* (562).

It is apparent from the examination had in February 1954 that the Examiner's prejudice is shown because that act of sexual intercourse admitted was with a male member of the Chinese race.

It would seem therefore that to deny citizenship to petitioner because of a *single act* of sexual intercourse *which she frankly admitted*, as so clearly shown by the authorities cited falls far short of saying that petitioner is not a person of good moral character, and without more, the court, in the exercise of its discretion in such matters, if the applicant has otherwise met the requirements of the law, should have overruled the recommendation of the examiner, or at least continued the matter for a few months from this quite innocent infraction.

Had she denied the act, which could only be definitely proven by the two parties involved, a different question would be involved provided the examiner was

able to prove the act and therefore show she had perjured herself. But appellant frankly admitted the act, and on her examination before the court at least showed the extenuating circumstances, which so far as moral character is concerned redounds to her credit and is strong evidence of that kind of good moral character to which the statute refers and as measured by the Board of Immigration Appeals in the case cited herein.

Petitioner denied prostitution and unless the government has some evidence of acts of prostitution on her part or other acts coming within the terms of the statute it would seem to be a *straining beyond* the limit of logic that one should be denied citizenship because of a single admitted act of indiscretion falling far short of any of the things mentioned in the statute which are grounds for denial of citizenship.

Suspicion alone without more is wholly insufficient.

Citizenship is not a matter of right but a privilege extended by a humane government upon such terms as it may choose and a painstaking search of the authorities has failed to disclose a single case over the years where any alien has been denied that coveted privilege on so flimsy a ground as contained in the recommendation of the examiner in this case. In

fact the attitude of the Board of Immigration Appeals is to the exact contrary.

It has been an administrative policy of long standing not to sustain a ground of exclusion (Cf. matter of G-A 4108657 B.1.A. May 9, 1944) or a ground of deportation (Cf. matter of C-A. 9663533 nor A - 1232140, C.O. Jan. 23, 1946) arising as a result of an alien's admission of the commission of the crime of adultery in the absence of a conviction thereof.

In the matter of A — In deportation proceedings
A - 1636772 Feb. 9, 1948 Vol. III Ad. Dec.
under I and N Laws of the United States p. 168.

In *Schmidt v. United States*, 177 F. (2d) 450 from the Second Circuit, it appears that Schmidt, a native of Germany was admitted to the United States for permanent residence on January 17, 1939; he was examined by Immigration officials and as the appellate court say, "in a moment of what may have been unnecessary frankness, he verified an affidavit before the examiner, which contained the following passage: 'Now and then I engaged in an act of sexual intercourse with women. These women have been single and unmarried women. As to the frequency of these acts I can only state that they occurred now and then. My last such act took place about a half a year ago with an unmarried woman.' *The only question in the*

case is whether by this admission the alien showed that he was not a person of good moral character."

The District Court had denied petitioner's application. The Court of Appeals, L. Hand, Chief Judge, reversed and granted the petitioner's application for citizenship.

See also *Petition of Rudder et al* (2d Cir., 1949) 159 F. (2d) 695.

In those cases the District Court had admitted to citizenship four aliens over the objection of the examiner who had recommended denial in each case on the ground that the petitioners had not established good moral character, which recommendation the District Court had overruled. The United States appealed and the Court of Appeals affirmed.

While not dealing with the question of sexual relations, the opinion of Judge St. Sure, of the District Court of the Northern District of California, Southern Division in the case of *In re Paoli*, 49 F. Supp. 128 shows the liberality in recent years.

In *Estrin v. United States* (2 Cir.) 80 F. (2d) 105 the court there said:

"I therefore conclude that proof that a petitioner had committed 'fornication' at least — the circumstances in this case is not an adequate ground

for saying that the petitioner is not 'of good moral character.' I do not find it necessary to decide whether it would be ground for denying citizenship if a petitioner had committed fornication for commercial motives or with a minor, or under circumstances different from those here involved. Petition for citizenship granted.

{Another district court held that "good moral character" as used in former Section 707 of this title was not susceptible to a precise, uncircumscribed definition, and did not mean "moral excellence" but it did require that an alien affirmatively establish good moral character up to the standard of the average citizen.

Petition of Gani (A.C. La. 1949) 86 F. Supp. 683.

Judge St. Sure, *In re Poali*, 49 Supp. 128 (131) said:

"In the present case there is only one black mark against the petitioner, and while his act is defined as a felony, he was never punished as a felon, for the court considered him a good risk for probation and, as the subsequent dismissal indicates, was justified in his opinion. The violation was not a vicious one or one which necessarily involved moral turpitude; it was purely a statutory crime. Applicant has apparently conducted himself properly for more than four years since his conviction. The motion of the Government is denied, and petitioner will be admitted to citizenship upon taking the required oath."

It is respectfully submitted that the appellant proved her good moral character when she admitted this *one* infraction rather than to perjure herself.

Respectfully submitted,

JOHN E. BELCHER
Attorney for Appellant

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

FLORENCE LILLIAN FLUMERFELT,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

F. N. CUSHMAN
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Office and Post Office Address:
1012 United States Court House
Seattle 4, Washington

FILED

MAY 17 1955

PAUL P. O'BRIEN, CLERK

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INDEX

	Page
JURISDICTION	1
STATUTE INVOLVED.....	2
STATEMENT	2
SUMMARY OF ARGUMENT.....	3
THE EVIDENCE.....	4
ARGUMENT	6
CONCLUSION	10

CASES CITED

<i>Application of Barug</i> , 76 F. Supp. 607.....	6
<i>Marcantonio v. United States</i> , 185 F. 2d 934.....	9
<i>Palkovitz Petition</i> , 67 Pa. D. and C. 319 (1949).....	9
<i>Petition of Gabin</i> , 60 F. Supp. 750 (1945).....	4
<i>Schmidt v. United States</i> , 177 F. 2d 450 (C.A. 2).....	8
<i>United States v. Rubia</i> , 110 F. 2d 92 (C.A. 5).....	8

STATUTES CITED

Title 8, U.S.C., Secs. 1331, 1427.....	1, 2, 6
Title 28, U.S.C., Sec. 1291.....	1

TEXTBOOKS

22 A.L.R. 2d 244, 246, 248.....	3, 9
---------------------------------	------

IN THE
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vs.

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JURISDICTION

The jurisdiction of the District Court is conferred by the provisions of Section 1331, Title 8 U.S.C., and on this Court by Section 1291, Title 28, U.S.C.

STATUTE INVOLVED

Section 1427 of Title 8, U.S.C. provides in part as follows:

(a) No person * * * shall be naturalized unless such petitioner * * * during all the period referred to in this subsection has been and still is a person of good moral character * * *

STATEMENT

Appellant's petition for naturalization was denied by the District Court on November 17, 1954. The Court by its order (R. 7) adopted the recommendation of the Naturalization Examiner, R. S. Sullivan (R. 8), that the petition be denied, "For failure to establish good moral character for the period required by law."

Appellant, a native of Canada, was admitted to the United States on April 5, 1948; thereafter she filed her petition for naturalization on June 1, 1953.

The only evidence on behalf of appellant in this case consists of the Petition for Naturalization, with attached affidavits from two witnesses, the transcript of appellant's interrogation before Immigration and Naturalization examiners, Sullivan and Miller, on February 9, 1954 (beginning R. 12) and again the transcript of her testimony before the District Court

on November 15, 1954 (beginning R. 12). Apart from the two affidavits mentioned above, no testimony in her behalf was received from any person other than appellant.

The only issue in the case is whether or not the District Court in its denial of appellant's application, on November 17, 1954, on the grounds of lack of proof of good moral character, abused its discretion.

A discussion of the evidence in some detail will be found *infra*.

SUMMARY OF ARGUMENT

Naturalization has been thoroughly established as a privilege and not a right. Annotation 22 A.L.R. 2d 244 at 248, Section 3 and cases cited therein. The burden of establishing good moral character within the meaning of the statute is on the petitioner. (Annotation *supra*) What positive evidence of good moral character has appellant supplied? No testimony was furnished by any persons other than appellant, save for the very general affidavits supplied with the original petition. On the contrary, apart from the admitted single occasion for illicit relations (R. 34), which appellant now artfully argues as showing honesty and good character, there is much other evidence which, when considered as a whole, supports a reasonable

presumption that appellant's life for the five years in question was far from meeting the required moral standards. What the District Court had to consider was the weight of the unfavorable inferences stemming from appellant's testimony, in contrast to the almost complete lack of favorable inferences.

It was argued in one case that citizenship could be granted on character evidence of a purely negative character, neither good nor bad, amounting at most to a claim that the mere passage of time has made a person worthy of citizenship. However, the court said that citizenship is not a price awarded for mere survival. *Petition of Gabin*, 60 F. Supp. 750 (1945, D.C. Cal.)

Appellee further contends that even though the District Court has discretion to consider the evidence, the Court would have committed clear error if appellant's character had been found adequate under a consideration of all the evidence presented in this case.

THE EVIDENCE

At the Immigration and Naturalization Service examination on February 9, 1954 (R. 12), appellant testified to having worked at various Chinese restaurants in Seattle, Washington, at one of which she had met a Chinese-American by the name of James Wong.

Apparently in May of 1953 appellant moved from a boarding house in another part of Seattle to the Terrace View Hotel, which according to appellant's own testimony (R. 17) was known in Chinatown as a second-rate hotel and, as she had also heard, a house of prostitution. Her reason for moving there was the fact (R. 14) that she knew quite a few people there. It then appeared on further questioning that she only knew, by name at least, James Wong and one other man (R. 15). At all times since moving to that hotel she had occupied a room adjoining that of James Wong, a married man, with whom she very easily (R. 19) admitted a sexual relationship of a vague character.

Testifying in Court on November 15, 1954, that relationship was explained, apparently after reflection (R. 34 and 35), to have occurred on only one occasion and that at a time prior to appellant's moving next door to Mr. Wong and without knowledge of his marital status. It is interesting to note the explanation made before the District Court of this lapse which was left completely unexplained before the Immigration and Naturalization Service examiners.

In connection with the above testimony in regard to the adjoining rooms, the testimony of Immigration and Naturalization Service Investigator Miller is significant. He testified (R. 40) that the door

from appellant's room to Mr. Wong's room was only locked with a bolt on Mr. Wong's side. That situation, coupled with the inference stemming from Miller's observation of Mr. Wong's unused bed, is significant. Mr. Miller further testified to the general reputation of the Terrace Hotel (R. 41, 42).

The remaining testimony is either negative or unfavorable in character. Appellant's membership in bottle clubs was noted (R. 36). Also her statement that "I have a drink with anyone" (R. 18). Such evidence is not conclusive evidence of bad moral character but unexplained and unrebutted by any real evidence tending to show good moral character is clear support for the Court's ruling below.

ARGUMENT

As previously cited, appellant must prove "good moral character" as required by 8 U.S.C. 1427(a). It is admitted, as appellant argues, that the term is not one of technical, legal connotation but is to be viewed in the light of prevailing standards of society. Appellant cites *Application of Barug*, 76 F. Supp. 607, where it was held that an obviously good faith marriage which was immediately corrected after the defect was made known was not a flaw resulting in "poor moral character." The difference in the intent of the parties

in that case and the instant case is so obvious as to need no comment. It should also be noted, however, that this was not an appellate case and hence it has no bearing on the issue here, i.e., is there an abuse of the district judge's discretion?

Appellant subsequently treats the question of whether or not she had committed adultery. Apparently it is believed that because the petition for naturalization explains that as a matter of law one committing adultery cannot be of good moral character, that unless adultery is committed her character must be good. This is an obvious *non sequitur* and really immaterial as offered to prove good moral character. It is obvious that all persons who do not commit adultery are not necessarily of good moral character in regard to sexual habits.

The same reasoning contains when considering the quotations of what is considered an "Entry for Immoral Purposes" (Appellant's brief, p. 9, citing the *Monthly Review* of the Immigration and Naturalization Service). A lack of immoral purpose for a limited time is not equivalent to a showing of "good moral character."

The remainder of appellant's brief is devoted to the proposition that one act of sexual indiscretion is not sufficient to show lack of "good moral character"

particularly where such act is allegedly frankly admitted. Assuming, as in *United States v. Rubia*, 110 F. 2d 92 (C.A. 5, 1940 Fla.), where the district court found that petitioner's *prima facie* showing of good character by six honorable discharges was not overcome by his admission that he was living with a married woman separated from her husband, that in the instant case there had been strong evidence of petitioner's good moral character, then it might have been within the discretion of District Judge Lindberg to have overlooked appellant's "single" indiscretion. However, appellant's indiscretion was revealed in an evasive manner and cannot be considered as clearly a single occasion. In fact, a strong presumption arises that it was a continuing status carried on "sub rosa" because of the situation at the Terrace View Hotel. Additionally, what in the instant case is the evidence showing good moral character?

Appellant's only real authority is *Schmidt v. United States*, 177 F. 2d 450 (2d Cir.), where an unmarried male admitted engaging now and then in acts of sexual intercourse with unmarried women. The court held that such lapses did not show he was not a person of good moral character. The court very clearly stated that the only question in the case was whether by the above admission the alien showed that he was not a person of good moral character.

In the instant case the question is much broader; namely, has appellant made a showing of good moral character which is sufficient to overcome the doubts raised by her place of residence and the implications from her admitted indiscretion. Again in the instant case we have the sexual indiscretion of a woman and not a man. The distinction here may not be wholly rational and yet it is generally understood that the sexual morality of women is to be considered more strictly than that of unmarried men. This double standard is a social fact of life, understood by all persons, and as the Fourth Circuit said in *Marcantonio v. United States*, 185 F. 2d 934, "the test which the statute prescribes is good moral character as that term is generally understood, not the judge's idea of the type of man who ought to be admitted to citizenship."

In *Palkovitz Petition*, 67 Pa. D. and C. 319 (1949), among other issues, the court pointed out that the petitioner had worked for one employer for 45 years and reasoned that the court should balance misdeeds with good deeds.

In conclusion, the annotation in 22 A.L.R. 2d 244, at page 246, presents a concise statement of the principles involved, as follows:

It has been frequently stated, and without dissent, that the purpose of the naturalization statutes is to admit to citizenship those aliens who,

having met other requirements, it appears will make good American citizens. Consequently, the courts agree that naturalization is a matter of grace, not of right, a privilege to be granted only upon compliance with all the terms prescribed by the Congress; that the good moral character requirements continue up to and including the date of final hearing upon the petition for naturalization; that the petitioner has the burden of proving good moral character; and that all doubts as to his good moral character must be resolved against the petitioner.

Appellant has presented no evidence of good moral character or other evidence that would show her as a desirable citizen. To the contrary, there is much evidence showing that her character is questionable at best, none of which was rebutted in the District Court.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

F. N. CUSHMAN
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No. 14,642

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLIE LEE KNIGHT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the District of Hawaii.

BRIEF FOR APPELLEE.

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PAUL P. O'BRIEN

Subject Index

Page

Statement of Jurisdiction.....	1
Statutes Involved	1
Statement of Facts	2
The Question Presented.....	5
Summary of the Argument.....	5
Argument	6
Conclusion	11

Table of Authorities Cited

Cases	Pages
Bartholemew v. U.S., 177 Fed. 902 (6 Cir. 1910), cert. denied 217 U.S. 608	8
Bozza v. U.S., 330 U.S. 160 (1947)	7, 10
Cook v. U.S., 171 F.(2d) 567 (1 Cir. 1948)	8
In Re Bonner, 151 U.S. 242, 257 (1894)	6, 10
Jordan v. U.S., 60 F.(2d) 4 (4 Cir. 1932)	8
Nancy, et al. v. U.S., 16 F.(2d) 872 (9 Cir. 1926)	8
Reynolds v. U.S., 98 U.S. 145, 168-169 (1878)	7
White v. Hunter, 76 F.Supp. 954 (D. Kansas 1948)	10
Wilson v. Bell, 137 F.(2d) 176 (6 Cir. 1943)	10

Statutes

The Bogg's Act, 26 USC Section 2557(b) (1)	1, 5, 6, 7, 9
18 USC Section 3231	1
21 USC Section 174	2
26 USC Section 2553(a)	2
28 USC Section 2255	1

Miscellaneous

Rule 18, Federal Rules of Criminal Procedure	1
Rule 52, Federal Rules of Criminal Procedure	7

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**On Appeal from the United States District Court
for the District of Hawaii.**

BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

The District Court had jurisdiction at the trial in this case under 18 USC Section 3231; Rule 18 of the Federal Rules of Criminal Procedure. After conviction and sentence appellant moved the District Court to correct sentence which motion was denied. Timely appeal was taken and the jurisdiction of this Court to review the order of the District Court is involved under Title 28 USC Section 2255.

STATUTES INVOLVED.

The Bogg's Act, 26 USC Section 2557(b)(1) provides:

“ . . . After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States Attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States Attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledged that he is such person, he shall be sentenced as prescribed in this paragraph.”

STATEMENT OF FACTS.

On January 22, 1953 appellant was sentenced to five years in prison for violating 26 USC Section 2553(a). He requested, and was granted a stay of mittimus for one day to take care of various business and personal effects. During this “day of grace” appellant committed two further violations of the law by attempting to dispose of an estimated \$300,000 worth of narcotics by mailing same to San Francisco. This transaction was discovered by the Bureau of Narcotics. Appellant was indicted on February 18, 1953 for violating 21 USC Section 174 and 26 USC Section 2553(a).

Being fully advised and having waived counsel, the record at the time of arraignment and plea on February 20, 1953, shows the following with respect to the contentions made here by the appellant:

“The Court. You do not? Bear in mind as you say that, that it is possible, in fact it is more than possible, that if you stand convicted of these offenses, you will be, under the Bogg’s Act, a second offender. You know what that means? That means there is a certain mandatory minimum sentence, and no possibility of probation.

The Defendant. Yes, your Honor.

The Court. You understand that?

The Defendant. Yes, sir.

The Court. All right, and understanding this, you still stand by your decision that you do not wish to have an attorney?

The Defendant. That is right, sir.” (T. 33.)

* * * * *

“The Court. All right, then as to Count I of this indictment, what is your plea, guilty or not guilty?

The Defendant. Guilty.

The Court. To Count II, what is your plea, guilty or not guilty ?

The Defendant. Guilty.

The Court. Very well. Let the pleas be recorded. On the basis of the pleas to Count I and Count II of this indictment, you are adjudged guilty. I have a recent pre-sentence report on you.” (T. 33-34.)

* * * * *

“Mr. Richardson. If your Honor please, our office has been informed that he is a second of-

fender. Just to comply with the rule, we would like to make an announcement to the Court that he will be a second offender under the Bogg's Act.

The Court. All right. I hear you, and in relation to that, I will tell you, Mr. Defendant, that if you deny being the same Willie Knight who heretofore has been tried and convicted in this Court of a narcotic offense, then the government has to do certain formal things to prove that fact. Do you deny being the same Willie Knight who has heretofore been convicted in this court?

The Defendant. I admit that I am the same." (T. 34-35.)

"The Court. I have heretofore accepted your pleas of guilty to the two counts of this indictment, and you have heretofore admitted that you are the same defendant who heretofore in this court has previously been, upon trial, convicted of a prior narcotics offense, which thus makes you a second offender in this matter. And under the Bogg's Act, no probation, of course, is possible, and would not be as a practical matter anyway, under these circumstances. You are already in confinement under a prior sentence for narcotics meted out by this court, and further the Bogg's Act for a second offender carries a mandatory minimum of five years and a maximum of ten years.

Now, in a moment, having a pre-sentence report on you and having tried your previous case, or been the presiding judge—yes, it was a jury waived case—having tried the first case, I know a good deal about you, based on that and the pre-sentence report." (T. 35-36.)

After being accorded a full opportunity to be heard prior to sentence, the appellant was thereafter, on the same day, sentenced to ten years on each count, the sentences to run concurrently with each other but consecutively with the first sentence he was already serving for the prior narcotics conviction.

THE QUESTION PRESENTED.

The question presented is whether the failure to file a written information pursuant to 26 USC Section 2557(b)(1) renders the sentence given under that section illegal and excessive.

SUMMARY OF THE ARGUMENT.

Failure to file the written information pursuant to 26 USC Section 2557(b)(1) did not render the sentence given under that section illegal and excessive. The failure to file an information used for purposes of establishing that defendant is a second or third offender is a technical defect in a procedural matter and appellant was not injured in any way by the omission to file a written information.

An appellant can gain nothing by having the sentence set aside. He may clearly be re-sentenced.

ARGUMENT.

Appellant alleges that no written information was filed by the United States Attorney as required by 26 USC Section 2557(b)(1), the Bogg's Act, and that therefore the sentence given under that statute is illegal and excessive. He further alleges that an information cannot now be filed by the United States Attorney, as it would be a denial of due process, and that his sentence should be corrected to a five year term.

There was no written information filed by the United States Attorney as should have been done pursuant to statute. However, the information required by 26 USC Section 2557(b)(1) is not of the usual technical legal type used to institute a criminal action. Its function is not to charge the accused with a crime for which he will be prosecuted, the situation where the traditional information is used. *In Re Bonner*, 151 U.S. 242, 257 (1894). Rather it is designed to inform the Court with the seriousness of a defendant's repeated acts, to notify the defendant that he is exposed to heavy punishment, and to require the Court to inflict a severe mandatory penalty if the defendant is in fact a second offender. As stated in the legislative history of 26 USC Section 2557(b)(1), U.S. Code, Congressional and Adm. Service, 82nd Congress, First Session 1951, Vol. 2, p. 2602, "The purpose of the bill is to make more stringent and more uniform the penalties which would be imposed." Because of the severity of the mandatory sentences involved, procedural safeguards were de-

vised to protect the accused. The defendant can have a jury trial to determine his identity as a second offender—not to determine if he is guilty of a distinct crime.

The information required by statute is thus one that should be interpreted in the ordinary dictionary sense of the word: to simply inform the Court and defendant of a fact to be taken into consideration for sentencing purposes. In the present case the appellant readily admitted, in pleading, that he was a second narcotics offender and factually within the confines of 26 USC Section 2557(b)(1). The sole basis of his claim is that a technical defect voided his sentence.

Appellant's appeal is based solely upon a technical defect which does not involve any "substantial right".

It is true that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal. *Bozza v. U. S.*, 330 U.S. 160 (1947); in a similar vein, *Reynolds v. U. S.*, 98 U.S. 145, 168-169 (1878). The basis of these decisions however is that a defendant would be injured if this were not done. Here, however, the letter of the law as to his sentence was followed; the technical defect occurred in a procedural matter prior to the actual sentencing.

Rule 52 of the Federal Rules of Criminal Procedure provides that errors which do not affect substantial rights shall be disregarded. Appellant's rights were in no way impaired by the failure to file a writ-

ten information. He admitted being a second offender in the same Court in the same district and before the same judge, who found him guilty of his first offense just one month before his second conviction. The Bogg's Act provision under consideration is intended to protect the narcotics defendant convicted whose name or alias is identical to the name of a like defendant convicted in the substantial past in a different district, or recently in the same but busy district before a different judge of a multiple judge Court, or before the same but excessively busy judge in a metropolitan area. Here the appellant knew, the government knew, and the judge knew to the point of absolute certainty, that the appellant was a second offender. This the appellant freely admitted again and again prior to being sentenced.

Appellant's complaint is analogous to the complaints made by those who were sentenced only to imprisonment under a statute that requires imprisonment and a fine. The objection raised was that because of this technical defect the sentence was void. This objection has been consistently refused by the Courts. *Bartholemew v. U. S.*, 177 Fed. 902 (6 Cir. 1910), cert. denied 217 U.S. 608; *Cook v. U. S.*, 171 F. (2d) 567 (1 Cir. 1948); *Jordan v. U. S.*, 60 F. (2d) 4 (4 Cir. 1932); *Nancy, et al. v. U. S.*, 16 F. (2d) 872 (9 Cir. 1926). The reasoning in these cases is that the defendant was not harmed by the technical defect and that the "complaint in that regard is absurd." *Bartholomew v. U. S.*, *supra*. This same

theory is applicable here. The technical defect involved, where measured against the facts of the case, does not warrant setting the sentence aside and bringing the appellant once again before the District Court for re-sentencing. As stated before, the appellant was not harmed in any way.

Appellant claims to have two authorities favorable to his point of view: *Loyola v. U. S.*, (DC Michigan, 1954), and *Baldwin v. U. S.*, (DC Ohio, 1953), both unreported. The Department of Justice has been unable to locate any record of the *Loyola* case either in Washington, D. C. or in the office of the United States Attorney at Detroit, Michigan.

In the *Baldwin* case the defendant plead guilty to an information charging him with possession of marihuana cigarettes without having paid the transfer tax thereon. Before sentence was pronounced, in response to a question by the Court, defendant said he had been convicted on two prior cases. The record does not disclose the nature of those convictions. Nine days later the United States Attorney filed a written information setting forth prior convictions of petitioner for offenses punishable under Title 26, USC Section 2557(b)(1). Petitioner did not have an opportunity in open Court to affirm or deny that he was identical with the person named in the information filed nine days after sentence. Held: There was nothing in the record at the time sentence was imposed to disclose that petitioner had committed two prior offenses punishable under Title 26, USC Section 2557(b)(1).

The *Baldwin* case is clearly distinguishable from the instant case. In *Baldwin*, defendant was not made aware of the prior offenses he was alleged to have committed nor was he given an opportunity to affirm or deny that he was identical with the person convicted of those offenses. In the instant case appellant was clearly aware of the prior narcotics conviction which the Court was informed he had committed. He then freely admitted that he was identical with the defendant of the prior narcotics conviction.

The Bogg's Act affords a defendant certain safeguards prior to imposing a penalty for second and third offenders. It requires that a defendant be made aware of the prior conviction which is attributed to him and allows him to litigate the question of identity. Here appellant was fully informed of the consequence of admitting identity. He knew which prior conviction the government attorney was referring to. He discussed certain details thereof at some length with the judge. (T. 38-48.) He freely admitted being identical with the defendant convicted just a month before in the same Court and before the same judge. Under the circumstances there is no substantial right of appellant involved which has been adversely affected.

The appellant cannot gain anything by having his prior sentence declared illegal. His allegation that he cannot be re-sentenced because of due process is not so. *Bozza v. U. S.*, *supra*; *In Re Bonner*, *supra*; *White v. Hunter*, 76 F. Supp. 954 (D. Kansas 1948); *Wilson v. Bell*, 137 F. (2d) 716 (6 Cir. 1943).

CONCLUSION.

The order of the District Court is correct and should be affirmed.

Dated, Honolulu, T. H.,
March 1, 1955.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,

By CHARLES R. WICHMAN,
Assistant United States Attorney,
District of Hawaii,

LLOYD H. BURKE,
United States Attorney,
Northern District of California,
Attorneys for Appellee.

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No. 14,643

IN THE

United States Court of Appeals
For the Ninth Circuit

HOWARD HILDEBRANDT,

Appellant,

vs.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

	Page
Jurisdiction	1
Statement of the Case	1
Opinion of the Court Below	2
Argument	4

Table of Authorities Cited

Cases	Pages
De Normand v. Swope (C.A. 9, 1953), 207 F. 2d 66	4
Jones v. Squier (C.A. 9, 1952), 195 F. 2d 179	4
Madigan v. Wells (C.A. 9, 1955), 224 F. 2d 577	4
Mills v. Hunter (C.A. 10, 1953), 204 F. 2d 468	4
United States v. Hildebrandt (1953), 113 F. Supp. 577	2
Whiting v. Hunter (C.A. 10, 1953), 204 F. 2d 471	4
Winhoven v. Swope (C.A. 9, 1952), 195 F. 2d 181	4

Statutes

28 United States Code:	
Section 2241	1
Section 2253	1
Section 2255	2, 3, 4

No. 14,643

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Appellant,

vs.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

This Court has jurisdiction under Sections 2241 and 2253 of Title 28, United States Code.

STATEMENT OF THE CASE.

This is an appeal from an order dismissing a petition for a writ of habeas corpus made and entered December 9, 1954 by United States District Judge Louis E. Goodman.

On December 7, 1954 appellant petitioned for a writ of habeas corpus on the ground that he had not waived a jury trial. He included as Exhibit B of his petition for habeas corpus a copy of the judgment

and commitment under which he is confined. It is recited in the judgment that the defendant was convicted upon his *plea of guilty*. (For a statement of the facts surrounding appellant's plea see *United States v. Hildebrandt* (1953), 113 F.Supp. 577). On April 6, 1953 and September 23, 1953 appellant applied for a motion to vacate under Section 2255 of Title 28 United States Code. On May 20, 1953 and February 12, 1954 the motions were denied. The Court of Appeals for the First Circuit, on November 17, 1954, affirmed the judgment of the District Court. On December 22, 1954 appellant appealed from the judgment of the District Court for the Northern District of California dismissing the petition for a writ of habeas corpus.

OPINION OF THE COURT BELOW.

“ORDER DISMISSING PETITION FOR THE WRIT OF HABEAS CORPUS

“Howard Hildebrandt petitions for the writ of habeas corpus upon the ground that the judgment and sentence under which he is imprisoned is void because he was not accorded a trial by jury, although a jury was not waived. He asserts that this Court has jurisdiction to entertain the petition because his two motions to vacate the sentence, addressed to the trial court pursuant to 28 USC 2255, have proved ineffective to test the legality of his detention.

“The petition for the writ alleges merely that: ‘On April 6, 1953 and September 23, 1953 petitioner

filed motions in the trial Court under Section 2255, in which he claimed among other things that he had been denied a jury trial and that the Court never formally found him guilty. On May 20, 1953 and February 12, 1954, the motions were denied and an appeal was prosecuted to the First Circuit Court of Appeals. On November 17, 1954 the Appellate Court affirmed the lower Court's judgment.'

"Petitioner attaches as an exhibit a copy of the per curiam opinion of the Court of Appeals in which the judgment of the trial court denying the second motion to vacate is affirmed. He does not set forth the contents of his motions to vacate nor the orders of the trial court denying them. Nor does he allege any facts other than that there is no oral or signed waiver of jury trial of record.

"Consequently the petition is entirely inadequate to show that the motions to vacate have proved ineffective to test the legality of his detention. Moreover, it appears from the copy of the judgment and commitment attached as an exhibit to the petition that the judgment and sentence was entered upon his plea of guilty. Thus the ground for relief asserted in the petition and allegedly presented in the motions to vacate is wholly frivolous.

"The petition for the writ of habeas corpus is dismissed.

"Dated: December 9, 1954.

"/s/ LOUIS E. GOODMAN

"United States District Judge."

ARGUMENT.

This appeal is frivolous. It needs no citations of authority to establish that a waiver of jury trial is unnecessary on a plea of guilty. Furthermore, appellant may not apply for habeas corpus in the circumstances here. His remedy is under Section 2255 of Title 28 United States Code. The mere fact that a 2255 motion was denied and that denial affirmed on appeal is no showing that the remedy by motion is inadequate or ineffective to test the legality of his detention. *De Normand v. Swope* (C.A. 9, 1953), 207 F.2d 66; *Jones v. Squier* (C.A. 9, 1952), 195 F.2d 179; *Winhoven v. Swope* (C.A. 9, 1952), 195 F.2d 181; *Whiting v. Hunter* (C.A. 10, 1953), 204 F.2d 471; *Mills v. Hunter* (C.A. 10, 1953), 204 F.2d 468; *Madigan v. Wells* (C.A. 9, 1955), 224 F.2d 577.

Dated, San Francisco, California,
November 9, 1955.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

Attorneys for Appellee.

United States
Court of Appeals
for the Ninth Circuit

CITIZENS UTILITIES COMPANY, a Corpora-
tion,

Appellant,

vs.

E. G. NIELSON, LLOYD G. HUDLOW,
ALOYSIUS L. KUNKEL, HOWARD C.
SCHRIBER, and ALBERT A. HAMILTON,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

APR 11 1955

No. 14644

United States
Court of Appeals
for the Ninth Circuit

CITIZENS UTILITIES COMPANY, a Corporation,

Appellant,

vs.

E. G. NIELSON, LLOYD G. HUDLOW,
ALOYSIUS L. KUNKEL, HOWARD C.
SCHRIBER, and ALBERT A. HAMILTON,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of Benson, E. A.....	48
Attorneys of Record.....	1
Bond for Temporary Restraining Order, Filed December 24, 1954.....	28
Bond for Temporary Restraining Order, Filed January 3, 1955.....	30
Certificate of Clerk.....	51
Complaint	9
Ex. A—Letter Dated March 2, 1954.....	18
B—Letter Dated March 16, 1954.....	23
Cost Bond.....	46
Docket Entries	3
Minute Entries:	
December 31, 1954—Continuing Return Day on Order to Show Cause and In- creasing Bond on Temporary Restrain- ing Order	30
January 17, 1955—Hearing on Defend- ants' Motions	41
January 19, 1955—Order Granting Defend- ants' Motions to Dismiss.....	43

INDEX	PAGE
Minute Entries—(Continued)	
January 21, 1955—Order Dismissing Com- plaint and Quashing Restraining Order.	44
January 31, 1955—Order Denying Plain- tiff's Motion for Restoration and Con- tinuance of Restraining Order Pending Appeal	50
Motion to Dismiss of Aloysius L. Kunkel and Howard C. Schriber.....	35
Affidavit of Kunkel, Aloysius L.....	37
Affidavit of Schriber, Howard.....	38
Notice of Motion.....	36
Motion to Dismiss and to Quash Service of E. G. Nielson and Lloyd G. Hudlow.....	40
Motion for Restoration and Continuance of Re- straining Order Pending Appeal.....	44
Notice of Appeal.....	46
Statement of Points.....	55
Summons	32
Return on Service of Writ.....	33
Temporary Restraining Order and Order to Show Cause.....	24

ATTORNEYS OF RECORD

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JOHN H. MATHEWS,
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DARRELL P. McCRORY,
Deputy City Attorney,
207 South Broadway,
Los Angeles, California,

Attorneys for Appellees.

DOCKET ENTRIES

Filings—Proceedings

1954

- Dec. 24— 1. File Plaintiff's Complaint.
- Dec. 24— 2. Enter and file Temporary Restraining Order and Order to Show Cause Returnable January 3, 1955, at 2:00 p.m.
- Dec. 24— 3. File Plaintiff's Bond for Temporary Restraining Order in the sum of \$1,000 with the Hartford Accident and Indemnity Co., as surety thereon.
- Dec. 31— Order continue return day on Order to Show Cause heretofore entered, until Monday, January 17, 1955, at 3:00 p.m., at Tucson, Arizona, and that Temporary Restraining Order remain in force until said time, and further order Pltf's bond on temporary restraining order be increased to the sum of \$10,000, said bond to be approved by the Clerk.

1955

- Jan. 3— 4. File Plaintiff's Bond for Temporary Restraining Order in the sum of \$10,000, with the Hartford Accident and Indemnity Co., as surety thereon and cc Temporary Restraining Order.

1955

- Jan. 4— 5. File Summons and cc Temporary Restraining Order returned by Marshal showing service on Aloysius L. Kunkle (Doe 2) and Howard Shriber (Doe 2), and on Albert E. Hamilton, Lloyd J. Hudlow, Fredrich C. Keller and A. E. Benson.
- Jan. 11— 6. File Motion to Dismiss of defendants Aloysius L. Kunkel and Howard C. Schriber and Notice for hearing Jan. 17, 1955, at 3:00 o'clock p.m. at Tucson and Memorandum in support thereof and Affidavits.
- Jan. 11— 7. File Motion to Dismiss or to Quash Service of defendant Albert E. Hamilton and Notice for hearing January 17, 1955, at 3:00 o'clock p.m. at Tucson and Memorandum in support thereof.
- Jan. 11— 8. File Motion to Dismiss and to Vacate Temp. Restr. Order of defendants E. A. Benson, Project Manager, Parker Davis Project, Bureau of Reclamation, Dept. of the Interior, and Frederick C. Keller, Asst. Engineer at Davis Dam, Bureau of Reclamation, Dept. of Interior, and Notice for hearing Jan. 17, 1955, at 3:00 o'clock p.m. at Tucson.
- Jan. 11— 9. File Memorandum in Support of Motion of Defts. E. A. Benson and Frederick C. Keller and Affidavits.

1955

- Jan. 11—10. File Motion Quash Service and to Dismiss of E. G. Nielson, Regional Director of Bureau of Reclamation, Region No. III, U. S. Dept. of Interior, and Lloyd G. Hudlow, Project Engineer, U. S. Bureau of Reclamation, U. S. Dept. of Interior.
- Jan. 11—11. File Memorandum in Support of the Motion of defendants E. G. Nielson and Lloyd G. Hudlow.
- Jan. 11—12. File Notice of hearing of Motion to Dismiss of defendants E. G. Nielson, Lloyd G. Hudlow, E. A. Benson and Frederick C. Keller for hearing Jan. 17, 1955, at 3:00 o'clock p.m. at Tucson.
- Jan. 17— Joseph Jenckes, Jr., and Earl Carroll appear for pltf.; Everett Gordon present for defts. Nielson, Hudlow, Benson and Keller. Mo. Gordon, order admit Darrell P. McCrory to practice specially in this case. Mo. Milton Cole, order admit John H. Mathews specially to practice in this case. McCrory and Mathews pres. for defts. Kunkel, Schriber and Hamilton. Mo. to dismiss of defts. Kunkel and Schriber; mo. to dismiss or to quash service of debt. Hamilton; mo.

1955

to dismiss and to vacate temporary restraining order of deft. Benson and mo. to quash service and to dismiss of deft. Nielson for hearing. Said motions argued, submitted and taken under advisement, ruling reserved to Wednesday, January 19, 1955, at 2 p.m. On stip. of counsel, order dismiss as to defts. Benson and Keller.

Jan. 19—

On for ruling on defts'. motions. Jos. Jenckes, Jr., pres. for pltf.; John H. Mathews and Darrell McCrory pres. for defts. Kunkel, Schriber & Hamilton; Everett Gordon pres. for defts. Nielson and Hudlow. Order grant motions of defts. Nielson and Hudlow. Order grant motions of defts. Nielson, Hudlow and Hamilton to quash purported service of process; order grant motions of defendants to dismiss on grounds that this is in reality a suit against the United States; order grant motions to dismiss on grounds Secretary of Interior is an indispensable party to action.

Jan. 20—13. File Pltfs'. Memorandum in Opposition to Deft's. Motions to Dismiss.

Jan. 21—14. File Reporter's Transcript of Proceedings of Hearing.

1955

- Jan. 21— Order dismiss complaint on grounds and for reasons (1) the suit is in reality a suit against the U. S. which has not consented to be sued; (2) the Secretary of the Interior is an indispensable party. Fur. order quash restraining order issued 2/24/54.
(Entered in Civil Docket 1/21/55).
- Jan. 21— Mail notice to counsel.
- Jan. 24—15. File pltf's. Motion for Restoration & Continuance of Restraining Order Pending Appeal.
- Jan. 24— Order that time for hearing on pltf's. Mo. for Restoration & Continuance of Restraining Order is shortened & motion is set for hearing on Jan. 31, 1955, at 2 p.m. at Tueson.
- Jan. 24— Mail notice to counsel.
- Jan. 24—16. File pltf's. Notice of Appeal.
- Jan. 24— Mail copies of Notice of Appeal to Roger Arnebergh, City Atty., John H. Mathews, Deputy City Atty., Darrell McCrory, Deputy City Atty., 207 South Broadway, Los Angeles, Calif., and Everett Gordon, Ass't. U. S. Atty., U. S. Courthouse, Phoenix, Arizona.
- Jan. 24—17. File Cost Bond in sum of \$250. with Hartford Accident & Indemnity Co.

1955

- Jan. 24—18. File appellant's Designation of Contents of Record.
- Jan. 31—19. File Points & Authorities of defts. Aloysius L. Kunkel & Howard C. Schriber in Opposition to Pltf's. Motion to Restore Temporary Restraining Order.
- Jan. 31—20. File Affidavit of E. A. Benson, Project Mgr., Parker-Davis Project.
- Jan. 31— For hearing on Pltf's. Mo. for Restoration & Cont. of Restraining Order pending Appeal. Joseph Jenckes pres. for pltf.; John H. Mathews & Darrell B. McCrory pres. for defts. Kunkel & Schriber; Everett Gordon pres. for defts. Nielson, Hamilton & Hudlow; Patricia Todd sworn as Court Reporter. Mo. argued; Order deny Pltf's. Mo. for Restoration & Continuance of Restraining Order Pending Appeal.
- Feb. 4— Order Patricia Todd permitted to withdraw case file to be returned before close of business this day.
- Feb. 5— Mail Record on Appeal to Clerk of Court of Appeals for the Ninth Circuit at San Francisco and mail copies of Clerk's Certificate and letter of transmittal of record to Court of Appeals to counsel.

In the United States District Court
for the District of Arizona

Civil—427 Pct.

CITIZENS UTILITIES COMPANY, a Corpora-
tion,

Plaintiff,

vs.

E. G. NIELSON, JOHN DOE 1, JOHN DOE 2,
JOHN DOE 3, JOHN DOE 4, JOHN DOE 5,
JOHN DOE 6, JOHN DOE 7, JOHN DOE 8,
and JOHN DOE 9,

Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action
against defendants alleges:

I.

Plaintiff is a corporation organized and existing
under the laws of the State of Delaware and duly
qualified to conduct its corporate business in the
State of Arizona. Defendant, E. G. Nielson, is a
resident of the State of Nevada and at all times
mentioned herein was and is now Regional Director
of the Bureau of Reclamation, Region No. III,
United States Department of the Interior, and as
such Regional Director is in responsible charge of
generation and distribution of electrical energy at
Hoover Dam and Power Plant located in the Colo-
rado River partially in the States of Nevada and

Arizona. Defendants John Doe 1 to 9, inclusive, are residents either of the State of Nevada or of the State of Arizona and are engaged in employment at and about Hoover Dam and Power Plant subject to the supervision, direction and control of defendant E. G. Nielson. That John Doe 1 to 9 are not the true names of said employees. The true names of such persons being unknown to plaintiff at this time. As soon as the true names of such persons are determined, the same will be substituted for the fictitious names herein alleged.

II.

The grounds upon which the jurisdiction of this Court depends are:

(a) Plaintiff is a corporation incorporated under the laws of the State of Delaware and is a citizen of that State, and all of the defendants are citizens either of the State of Nevada or the State of Arizona.

(b) The action arises under the laws of the United States, i.e., 43 U.S.C.A., §617 through 617v and 43 U.S.C.A., §618 through 618o, as hereinafter more fully appears.

(c) The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

III.

At all times mentioned herein plaintiff was and is now a public service corporation engaged in the business of owning and operating, among other

things, an electric utility system serving consumers in Mohave County, Arizona, with electrical energy for domestic, industrial and commercial purposes. Plaintiff also owns and operates an electric utility system at and about Nogales, Santa Cruz County, Arizona.

IV.

Under date of January 7, 1938, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and Acts amendatory thereof or supplementary thereto, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the "Boulder Canyon Project Act," the United States of America, acting through the Secretary of the Interior, entered into a contract with plaintiff. On or about the 2nd day of December, 1941, pursuant to the Acts of Congress hereinabove mentioned and further pursuant to the Act of Congress approved July 19, 1940 (54 Stat. 774), designated the "Boulder Canyon Project Adjustment Act," the United States of America, acting through the Secretary of the Interior, entered into a contract with plaintiff in substitution for the contract entered into between said parties on the 7th day of January, 1938.

V.

Under the provisions of said contracts of January 7, 1938 and of December 2, 1941, the United States of America agreed, among other things, to cause to be delivered to plaintiff at and from the Arizona Wing of Hoover Dam Power Plant for the

period beginning October 20, 1938, and ending on and including December 31, 1954, so much firm electrical energy as would be required by plaintiff for distribution to its customers, not however exceeding 50,000,000 kwh annually at rates specified to be measured by provisions of the contract. Over the period of time during which the contract has been in force the average cost per kwh to plaintiff for this energy has been approximately $2\frac{1}{4}$ mills per kwh. Under the provisions of said contract the electrical energy to be delivered by the United States of America to plaintiff thereunder was to be generated by means of generators situated in the Arizona Wing of the Hoover Dam Power Plant.

VI.

Since October, 1938, substantially all electrical energy distributed by plaintiff to its consumers through its aforesaid Mohave County electrical system has been generated at the Hoover Dam Power Plant aforesaid and purchased by plaintiff from the United States of America pursuant to the aforesaid contracts. Plaintiff's purchases of said electrical energy have approximated from 19,000,000 to 24,000,000 kwh annually. In the foreseeable future plaintiff's demand for electrical energy for use in Mohave County will be as great or will exceed that in the past.

VII.

Section 5 of said Boulder Canyon Project Act (43 U.S.C.A. §617d) reads in part as follows:

“Renewal of contracts for electrical energy.
The holder of any contract for electrical

energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply."

Plaintiff, as the holder of a contract referred to in §617d hereinabove is among that class of persons upon whom rights of renewal were conferred thereby. To the date of this Complaint the Secretary of the Interior has not manifested any intention of election to purchase or acquire Plaintiff's facilities as provided in §617d.

VIII.

In or about the year 1952 plaintiff, pursuant to the provisions of §617d of the Boulder Canyon Project Act aforesaid duly made application to the Secretary of Interior for the renewal of its contract dated December 2, 1941. In response to said request the Secretary of Interior, by letter to plaintiff dated on or about March 2, 1954 (a copy of which is attached hereto, marked Exhibit "A" and by reference made a part hereof), offered to renew said contract. On or about the 16th day of March, 1954, plaintiff accepted said offer of renewal by letter, copy of which is attached hereto, marked Exhibit "B" and by reference made a part hereof.

IX.

Prior to March, 1954, plaintiff, in order to protect its consumers in Mohave County, Arizona, from a failure or shortage of electrical energy in the event that the Secretary of the Interior made the alternative election to purchase or acquire plaintiff's facilities as provided for in §617d of the Boulder Canyon Project Act, contracted with the Arizona Power Authority to purchase from it for delivery to plaintiff in Mohave County, 18,400,000 kwh of electrical energy annually commencing January 1, 1955. Subsequent to the acts of the Secretary of March, 1954, and in reliance thereupon, and in view of the lack of any further need for a reserve supply of energy for Mohave County, plaintiff made arrangements with the Arizona Power Authority for the transfer of its said block of 18,400,000 kwh of electrical energy to its electric distribution system in and about Nogales, Santa Cruz County, Arizona. In connection with said arrangement and in implementation thereof, plaintiff undertook the construction of an electrical transmission line from the vicinity of Tucson, Arizona, to Nogales, Arizona, at an estimated cost of \$873,000.00 for the purpose of transmitting the said Arizona Power Authority block of energy to Nogales and distributing it to plaintiff's customers in that area. In further reliance upon the acts of the Secretary of March, 1954, plaintiff abandoned its plans for increasing the generating capacity of its Nogales electrical plant to meet the increasing demands of its customers in that area. To date plain-

tiff has expended in the construction of the aforesaid Tucson to Nogales transmission line, approximately \$275,000.00 and stands committed for the expenditure of approximately \$75,000.00 in excess thereof.

X.

To the date of this complaint and despite repeated requests by plaintiff, the Secretary of the Interior has unlawfully and improperly failed and refused to perform the purely ministerial act of executing and delivering to plaintiff the formal written contract of renewal, as required by §617d of the Boulder Canyon Project Act and the determination of the Secretary of March, 1954. Plaintiff is informed and believes that the said renewal will not be given by the Secretary of the Interior to plaintiff. To the contrary, plaintiff is informed and believes that the Secretary of the Interior has announced his intention, and has threatened, to terminate the supply of electrical energy to plaintiff from Hoover Dam as of the date of the expiration of the 1941 contract, i.e., midnight, December 31, 1954. The omissions and the threats hereinabove described are arbitrary and capricious, conceived and executed in bad faith and are beyond the authority in law of the Secretary of the Interior. Plaintiff is informed and believes that the Secretary of the Interior has given, or will shortly give, instructions to defendant Nielson and defendants John Doe I through 9, to effect a discontinuance of the delivery of Hoover Dam energy to plaintiff as of midnight, December 31, 1954. Plaintiff is further

informed and believes that the said defendants, unless restrained by this complaint, will carry out the said unlawful instructions of the Secretary.

XI.

If defendants are permitted to discontinue the distribution of Hoover Dam electrical energy to plaintiff as threatened, plaintiff will suffer irreparable injury which cannot adequately be redressed by an action at law, for the reasons:

(a) Plaintiff has no facilities or commitments which assure plaintiff a supply of electrical energy for delivery to its consumers in Mohave County after December 31, 1954.

(b) If plaintiff is able to purchase electrical energy for delivery to its Mohave County consumers subsequent to December 31, 1954, it will be conditioned upon plaintiff making long-term commitments for such energy which will render ineffective any ultimate relief which might be granted herein, and in any event, the cost of such energy will be more than double the cost of energy purchased under the 1941 contract aforesaid.

(c) The uncertainty which will result from plaintiff's lack of a firm and economical supply of electrical energy will result in a loss of consumer demand and resulting damage to plaintiff which will be impossible to accurately measure in an action at law.

(d) Plaintiff will be compelled to institute and prosecute multiple and successive actions at law for the recovery of its damages.

XII.

Plaintiff has no adequate remedy at law. No previous application for this or any similar relief has been made to any other Court or judge.

Wherefore, plaintiff prays as follows:

1. That a temporary restraining order be issued forthwith and without notice to the defendants, enjoining, restraining and prohibiting the defendants, and each of them, their officers, agents, servants, employees, attorneys and all other persons in active concert or participation with them, and all persons having actual notice of said restraining order, from doing or failing to do any act or thing which will cause or result in an interference with or disruption, termination or cessation of the delivery of Hoover Dam electrical energy to plaintiff in the manner of and under the conditions now governing the delivery of such energy to plaintiff.

2. That in conjunction with the granting of the aforesaid temporary restraining order, an order to show cause be issued directing the defendants to show cause within the time fixed by law why a preliminary injunction should not issue enjoining and restraining the defendants and others as aforesaid.

3. That upon due notice and final hearing a writ of permanent injunction be issued enjoining, restraining and prohibiting defendants and others as aforesaid.

4. That plaintiff have such other and further relief as to this Honorable Court may seem meet

and equitable in the premises and that the plaintiff have and recover his costs herein expended.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ J. S. JENCKES, JR.,
Attorneys for Plaintiff.

Duly verified.

EXHIBIT A

United States Department of the Interior, Office
of the Secretary, Washington 25, D. C.

Mar. 2, 1954.

My Dear Mr. Gould:

Recently there has been an interchange of correspondence between this office and the City of Los Angeles, the Southern California Edison Company, and the California Electric Power Company, pertaining to an extension of the term of contract of the California-Pacific Utilities Company for power and energy from the Hoover Dam Powerplant of the Boulder Canyon Project. A copy of our joint letter to the above three allottees, together with a copy of the Memorandum from the Office of The Solicitor, is enclosed for your information. You will note that we are instructing the Commissioner of Reclamation to extend the term of contract of the California-Pacific Utilities Company as indicated in the joint letter.

If you are interested in extending your contract for Hoover Dam power and energy, it is suggested that you confer with the Regional Director of the Bureau of Reclamation at Boulder City, Nevada.

Sincerely yours,

/s/ DOUGLAS McKAY,
Secretary of the Interior.

Mr. Milton S. Gould,
Citizens Utilities Company,
Greenwich, Connecticut.

Enclosures 2.

United States Department of the Interior, Office
of the Secretary, Washington, D. C.

Mar. 2, 1954

Gentlemen:

Your letters of January 18, January 29, and January 20, 1954, respectively, pertaining to the future supply of Boulder Canyon Project power and energy from the Hoover Dam to the California-Pacific Utilities Company, have been received.

Subsequent to the receipt of your letters, this matter was referred to the Office of The Solicitor, Department of the Interior. There is enclosed for your information a copy of a Memorandum, dated February 18, 1954, prepared by Mr. William J. Burke, Special Assistant to the Solicitor.

In accordance with the Memorandum of the Office

of The Solicitor, we are instructing the Commissioner of Reclamation to offer to extend the contract of the California-Pacific Utilities Company for such term as the Company may desire, up to midnight of May 31, 1987, with a provision that the power and energy may be withdrawn in whole or in part by the Metropolitan Water District of Southern California only upon a showing by the District of its needs for such power and energy. The Commissioner of Reclamation is also being instructed to offer a similar extension of contract to the Citizens Utilities Company.

We are sending copies of this letter to the Metropolitan Water District of Southern California, Colorado River Commission of Nevada, Arizona Power Authority, California-Pacific Utilities Company, and Citizens Utilities Company.

Sincerely yours,

/s/ DOUGLAS McKAY,

Secretary of the Interior.

The City of Los Angeles,
Department of Water and Power,
Los Angeles 54, California.

Southern California Edison Company,
Edison Building,
Los Angeles 53, California.

California Electric Power Company,
Riverside, California.

Enclosure

- Copy to:
1. Metropolitan Water District of Southern California.
 2. Colorado River Commission of Nevada.
 3. Arizona Power Authority.
 4. California-Pacific Utilities Company.
 5. Citizens Utilities Company.
 6. Regional Director, Boulder City, Nev.
 7. Regional Counsel, Los Angeles, Calif.

(All with copy of Memorandum of Solicitor of 2/18/54.)

(Copy)

United States Department of the Interior, Office
of the Solicitor, Washington 25, D. C.

February 18, 1954.

Memorandum

To: Under Secretary Tudor,
From: William J. Burke,
Subject: California-Pacific Utilities Company.

The extant contract with the Metropolitan Water District of Southern California is that of May 29, 1941. This contract is in excess of the District's needs for firm energy. The United States can sell the unused District firm energy. The contract of November 21, 1941, with the California-Pacific Utilities Company is for a purchase of the District's unused firm energy. The subject-matter energy of the contract of May 31, 1945, with the City of Los Angeles, the Southern California Edi-

son Company, Ltd., and the California Electric Power Company is defined in the sixth Whereas clause as all Boulder firm energy unused by the District for pumping water "and unused by the resale consumers under contracts referred to in Article 5 hereof." The California-Pacific Utilities Company is one of such "resale consumers" to the extent of 20,000,000 kwh.

Thus, the conclusion is compelled that the 20,000,000 kwh unused District energy as of December 31, 1954, contracted for by the California-Pacific Utilities Company under its November 21, 1941 contract is excluded from the "unused energy" contracted for by the City of Los Angeles, Edison Company, and California Electric under the May 31, 1945, contract. Such unused District energy is available for sale by the United States without obtaining the consent of the City of Los Angeles, Edison Company, and California Electric. I recommend that letters, accordingly, be sent to Kine, Ernst, Davenport and Morris.

/s/ WILLIAM J. BURKE,
Special Assistant to the
Solicitor.

EXHIBIT B

(Copy)

Citizens Utilities Company

March 16, 1954.

Kingman, Arizona.

E. G. Nielson, Regional Director,
U. S. Bureau of Reclamation,
Boulder City, Nevada.

Dear Mr. Nielson:

We wish to confirm our visit to Boulder City in reference to the letter of March 2, 1954, addressed to Mr. Milton S. Gould.

Please be advised that in accordance with the memorandum from the office of the Solicitor, dated February 18, 1954, and the letters of the Secretary of the Interior, we accept the offer to extend up to midnight of May 31, 1987, the existing contract for the supply of power and energy from Hoover Dam.

Yours very truly,

JOHN C. GIBBS,
Vice President.

JCG:mlh

cc: Milton S. Gould,

Douglas McKay, Secretary of the Interior.

[Endorsed]: Filed December 24, 1954.

In the United States District Court,
for the District of Arizona

Civ. No. 427 Prc.

CITIZENS UTILITIES COMPANY, a Corpora-
tion,

Plaintiff,

vs.

E. G. NIELSON, JOHN DOE 1, JOHN DOE 2,
JOHN DOE 3, JOHN DOE 4, JOHN DOE 5,
JOHN DOE 6, JOHN DOE 7, JOHN DOE 8,
and JOHN DOE 9,

Defendants.

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Whereas, in the above-entitled cause a verified Complaint has been filed, and it appearing from the specific facts set forth in said Complaint that immediate and irreparable injury, loss or damage will be caused to the plaintiff, his property and property rights, unless the above-named defendants are, pending a hearing for a preliminary injunction, restrained and enjoined as herein set forth, and it further appearing that plaintiff has no plain, speedy or adequate remedy at law, all for the reasons:

1. That plaintiff is now engaged as a public service corporation, owning and operating an electrical distribution system in Mohave County, Arizona, and has for some time past, and presently, re-

ceived energy for distribution to its customers from the Bureau of Reclamation, Department of the Interior, at Hoover Dam, and

2. That plaintiff claims a right to renewal and the existence of a renewal of its contract for the delivery of electrical energy to it by the Bureau of Reclamation, Department of Interior, at Hoover Dam, and

3. That the Secretary of the Interior has offered to renew and has in fact renewed the contract between plaintiff and the Secretary of the Interior for the sale of such energy by the Secretary to plaintiff for a period terminating on May 31, 1987, and

4. That the Secretary of the Interior has failed to execute and deliver to plaintiff a written contract representing such renewal and has, to the contrary, announced his intention not to deliver such formal written contract of renewal and to terminate plaintiff's supply of energy from Hoover Dam as of midnight, December 31, 1954, and

5. That defendants, and each of them, are responsible for and supervise the generation and distribution of electrical energy at Hoover Dam and have threatened and made known to plaintiff their instructions to terminate plaintiff's supply of Hoover Dam energy as of midnight, December 31, 1954, and

6. That plaintiff has no facilities or commitments which assure plaintiff a supply of electrical

energy for delivery to its consumers in Mohave County after December 31, 1954, and

7. That if plaintiff is able to purchase electrical energy for delivery to its Mohave County consumers subsequent to December 31, 1954, it will be conditioned upon plaintiff making long-term commitments for such energy which will render ineffective any relief which might be granted herein, and, in any event, the cost of such energy will be more than double the cost of energy purchased under said 1941 contract, and

8. That the uncertainty which will result from plaintiff's lack of a firm and economical supply of electrical energy will result in diminished consumer demand and consequent damage to plaintiff which will be impossible to accurately measure in an action at law, and

9. That plaintiff will be compelled to institute and prosecute multiple and successive actions at law for the recovery of its damages, and

Whereas, it further appears that the expiration of the time necessary in giving the defendants reasonable notice would result in the irreparable loss and damage to plaintiff which is sought to be prevented or mitigated by this Order,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that, conditioned upon plaintiff giving bond in the sum of \$1,000 as required by the provisions of Rule 65, Federal Rules of Civil Procedure, to be approved by the Clerk, the defendants

and each of them, their agents, servants, employees, attorneys and all other persons in active concert or participation with them, and all persons having actual notice of this Order, be and they hereby are enjoined and restrained from doing or failing to do any act or thing which will cause or result in an interference with or disruption, termination or cessation of the delivery of Hoover Dam electrical energy to plaintiff in the manner or under the conditions now covering the delivery of such energy to plaintiff.

It Is Further Ordered that this Order shall expire upon the date hereinafter mentioned unless within said time it is for good cause shown extended for a longer period, or unless defendants consent that it may be extended for a longer period.

It Is Further Ordered, Adjudged and Decreed that the defendants and each of them show cause before this Court, if any they have, in the Federal District Court hereof at the Federal Court House at Phoenix, Arizona, on the 3rd day of January, 1955, at the hour of 2:00 o'clock p.m., why defendants and each of them, their officers, agents, servants, employees, attorneys and all other persons in active concert or participation with them, shall not be enjoined and restrained in accordance with the terms of this restraining order for the pendency of this action.

It Is Further Ordered, Adjudged and Decreed that copies of this temporary restraining order be personally served upon the defendants forthwith.

Issued in Open Court this 24th day of December, 1954, at the hour of 11:45 o'clock a.m.

/s/ DAVE W. LING,

United States District Judge.

[Endorsed]: Filed December 24, 1954.

[Title of District Court and Cause.]

BOND FOR TEMPORARY RESTRAINING ORDER

Know All Men by These Presents that we, Citizens Utilities Company, as principal, and Hartford Accident & Indemnity Company, as surety, are held and firmly bound unto E. G. Nielson, John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, John Doe 6, John Doe 7, John Doe 8, and John Doe 9, defendants in the above-entitled action in the sum of One Thousand Dollars (\$1,000.00) to be paid to said defendants, their heirs, executors, administrators and assigns, to the payment of which we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of December, 1954.

The condition of the above obligation is such that whereas Citizens Utilities Company, plaintiff in the above-entitled cause, has obtained from the United States District Court for the District of Arizona, a Temporary Restraining Order against defendants, upon condition that plaintiff shall execute and file a

good and sufficient bond for the sum of \$1,000.00, to secure the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

Now, if the above bounded Citizens Utilities Company and Hartford Accident & Indemnity Company shall well and truly pay all such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by reason of said Temporary Restraining Order should it be thereafter dissolved or it be decided that said Temporary Restraining Order was wrongfully obtained, then this obligation to be void, otherwise it shall remain in full force and virtue.

CITIZENS UTILITIES
COMPANY,

By /s/ J. S. JENCKES, JR.,
Its Atty., Principal.

[Seal] HARTFORD ACCIDENT &
INDEMNITY COMPANY,

By /s/ V. M. HALDIMAN,
Surety.

Above bond approved this 24th day of December,
1954.

/s/ WM. H. LOVELESS,
Clerk of District Court.

[Endorsed]: Filed December 24, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,
DECEMBER 31, 1954

Honorable Dave W. Ling, United States District
Judge, Presiding.

Joseph S. Jenckes, Jr., Esquire, and Earl Carroll, Esquire, appear for the plaintiff. Everett Gordon, Esquire, Assistant United States Attorney, appears on behalf of the defendants.

It Is Ordered that the return day on Order to Show Cause, heretofore entered, is continued until Monday, January 17, 1955, at 3:00 o'clock p.m., at Tucson, Arizona, and that the Temporary Restraining Order herein remain in force until said time.

It Is Further Ordered that Plaintiff's bond on temporary restraining order be increased to the sum of \$10,000.00, said bond to be approved by the Clerk.

[Title of District Court and Cause.]

BOND FOR TEMPORARY RESTRAINING
ORDER

Know All Men by These Presents that we, Citizens Utilities Company, as principal, and Hartford Accident & Indemnity Company, as surety, are held and firmly bound unto E. G. Nielson, John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, John Doe 6, John Doe 7, John Doe 8, and John Doe 9, defendants in the above-entitled action, in the sum of Ten Thousand and No/100 Dollars (\$10,000.00)

to be paid to said defendants, their heirs, executors, administrators and assigns, to the payment of which we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of December, 1954.

The condition of the above obligation is such that whereas Citizens Utilities Company, plaintiff in the above-entitled cause, has obtained from the United States District Court for the District of Arizona, a Temporary Restraining Order against defendants, upon condition that plaintiff shall execute and file a good and sufficient bond for the sum of \$10,000.00, to secure the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

Now, if the above-bounded Citizens Utilities Company and Hartford Accident & Indemnity Company shall well and truly pay all such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by reason of said Temporary Restraining Order should it be thereafter dissolved or it be decided that said Temporary Restraining Order was wrongfully obtained, then this obligation to be void, otherwise it shall remain in full force and virtue.

CITIZENS UTILITIES
COMPANY,

By /s/ J. S. JENCKES, JR.,
Its Attorney, Principal.

[Seal]

HARTFORD ACCIDENT &
INDEMNITY COMPANY,

By /s/ V. M. HALDIMAN,

V. M. Haldiman, Attorney-in-
Fact, Surety.Above bond approved this 3rd day of January,
1955.

/s/ WM. H. LOVELESS,

Clerk of District Court.

[Endorsed]: Filed January 3, 1955.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendants: E. G. Nielson, John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, John Doe 6, John Doe 7, John Doe 8, and John Doe 9. You are hereby summoned and required to serve upon Evans, Hull, Kitchel & Jenckes, plaintiff's attorneys, whose address is 807 Title & Trust Bldg., Phoenix, Arizona, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal]

WM. H. LOVELESS,

Clerk of Court;

/s/ DOROTHY J. KENNEDY,

Deputy Clerk.

Date: Dec. 27, 1954.

Note—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Return on Service of Writ

United States of America,
District of Arizona—ss.

I hereby certify and return that I served the annexed Summons and Temporary Restraining Order and Order to Show Cause on the therein-named (John Doe 1) Aloysius L. Kunkel and (John Doe 2) Howard Schriber in their office in the Boulder Dam at 3:00 p.m. and on Albert E. Hamilton in his office at Boulder City, Nev., at 4:00 p.m. and on Lloyd J. Hudlow in his office at Boulder City, Nev., at 4:40 p.m. and on Fredrick C. Keller at his place of residence at Davis City, Ariz., at 7:20 p.m. by showing each of them the original Summons at the time and place specified and by handing to and leaving a true and correct copy thereof with each of them personally at time and place specified in said District on the 29th day of December, 1954.

ARCHIE M. MEYER,

U. S. Marshal;

By /s/ ARLEIGH T. HARTLEY,
Deputy.

Travel \$20.10

Service \$20.00

\$40.10

Return on Service of Writ

United States of America,
District of Arizona—ss.

I hereby certify and return that I served the annexed Summons on the therein-named E. A. Benson

(who states true name to be Erick A. Benson) by handing to and leaving a true and correct copy thereof with attached Complaint to him personally at 6:15 W. 43rd Ave., Phoenix, Arizona, in the said District at 3:15 p.m., on the 28th day of December, 1954.

ARCHIE M. MEYER,

United States Marshal;

By /s/ MARVIN C. MORRISETT,
Deputy.

Marshal's fees \$2.00

Mileage 1.10

Return on Service of Writ

United States of America,

District of Arizona—ss.

I hereby certify and return that I served the annexed Temporary Restraining Order and Order to Show Cause on the therein-named E. A. Benson (who states true name to be Erick A. Benson) by handing to and leaving a true and correct copy thereof with him personally at 6:15 So. 43rd Ave. at Phoenix, Arizona, in the said District at 3:15 p.m., on the 28th day of December, 1954.

ARCHIE M. MEYER,

United States Marshal;

By /s/ MARVIN C. MORRISETT,
Deputy.

Marshal's fees \$2.00

Mileage none

[Endorsed]: Filed January 4, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendants Aloysius L. Kunkel and Howard C. Schriber, and each of them separately, moves the court as follows:

1. To dismiss the action on the ground that the action is in essence an action against the United States, and the United States has not consented to be sued.

2. To dismiss the action because of the absence of an indispensable party defendant, to wit: Douglas McKay, Secretary of the Interior of the United States of America.

3. To dismiss the action on the grounds that neither the defendant Kunkel nor the defendant Schriber is a proper party.

4. To dismiss the action on the ground that it has been filed in the wrong District, because the action set forth in the complaint is not founded solely on diversity of citizenship.

5. To dismiss the action on the ground that the plaintiff has a complete and adequate remedy at law.

ROGER ARNEBERGH,

City Attorney of the City of
Los Angeles;

GILMORE TILLMAN,

Chief Assistant, City Attorney
for Water and Power;

JOHN H. MATHEWS,

Deputy City Attorney;

DARRELL P. McCRORY,
Deputy City Attorney;

By /s/JOHN H. MATTHEWS,
Attorneys for Defendants Aloysius L. Kunkel and
Howard C. Schriber.

Notice of Motion

To Messrs. Evans, Hull, Kitchel and Jenckes, Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court in the Court Room of the United States District Court, Tucson, Arizona, on the 17th day of January, 1955, at 3:00 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard.

ROGER ARNEBERGH,
City Attorney of the City of
Los Angeles;

GILMORE TILLMAN,
Chief Assistant, City Attorney
for Water and Power;

JOHN H. MATTHEWS,
Deputy City Attorney;

DARRELL P. McCRORY,
Deputy City Attorney;

By /s/ JOHN H. MATTHEWS,
Attorneys for Defendants Aloysius L. Kunkel and
Howard C. Schriber.

[Title of District Court and Cause.]

AFFIDAVIT OF ALOYSIUS L. KUNKEL

State of Nevada,

County of Clark—ss.

Aloysius L. Kunkel, being first duly sworn, deposes and says, that he is one of the parties sued as defendant in the above-entitled action, he having been named therein as John Doe 2; that he is an employee of the Department of Water and Power of the City of Los Angeles, a Municipal Corporation, of the State of California; that as such employee he has the title of Chief Electric Power Plant Operator for the City of Los Angeles at Hoover Dam Power Plant; that his duties are to supervise and direct a group of operators at the plant, which group, in three shifts during each day, operate the generating facilities and the transforming and switching equipment at Hoover Dam Power Plant assigned to the City of Los Angeles under the provisions of that certain agreement dated May 29, 1941, between the United States, the City of Los Angeles and its Department of Water and Power and Southern California Edison Company, said agreement being commonly known as the Agency Contract; that as such employee he is not under the direct supervision or control of the Regional Director, Region III, Boulder City, Nevada, or of any other employee or officer of the United States; that his immediate supervisors in connection with his duties are employees of the Department of Water and Power of the City of Los Angeles, to wit, the Superintendent for the City of

Los Angeles at Hoover Dam Power Plant and the Assistant Superintendent; that he is subject to the supervision and directions of such Superintendent and Assistant Superintendent and their superiors in the Department of Water and Power of the City of Los Angeles and of no other person or persons whatsoever.

/s/ ALOYSIUS L. KUNKEL,

Subscribed and Sworn to Before Me This 10th Day of January, 1955.

[Seal] /s/ LILLIAN M. WESTEN,

Notary Public in and for Said
County and State.

My Commision Expires November 3, 1957.

[Title of District Court and Cause.]

AFFIDAVIT OF HOWARD SHRIBER

State of Nevada,
County of Clark—ss.

Howard Shriber, being first duly sworn, deposes and says, that he is one of the parties sued as defendant in the above-entitled action, he having been sued therein as John Doe 3; that he is an employee of the Department of Water and Power of the City of Los Angeles, a Municipal Corporation of the State of California; that as such employee he has the title of shift foreman and as such his duties are to supervise and direct a group or shift of operators, which group during its shift, operates the generating facilities and the transforming and switching equipment at Hoover Dam Power Plant

assigned to the City of Los Angeles under the provisions of that certain agreement dated May 29, 1941, between the United States, the City of Los Angeles and its Department of Water and Power, and Southern California Edison Company, commonly known as the Agency Contract; that as such employee he is not under the direct supervision or control of the Regional Director, Region III, Boulder City, Nevada, or any other employee or officer of the United States; that his immediate superiors in connection with his employment are employees of the Department of Water and Power of the City of Los Angeles, to wit, the chief Electric Plant Operator, the Superintendent for the City of Los Angeles at Hoover Dam Power Plant, and the Assistant Superintendent; that he is subject to the supervision and direction of such Chief Electric Plant Operator, the said Superintendent and the said Assistant Superintendent and their superiors in the Department of Water and Power of the City of Los Angeles, and of no other person or persons whatsoever.

/s/ HOWARD SHRIBER.

Subscribed and Sworn to Before Me This 10th Day of January, 1955.

[Seal] /s/ LILLIAN M. WESTEN,

Notary Public in and for Said
County and State.

My Commission Expires November 3, 1957.

[Endorsed]: Filed January 11, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS AND TO QUASH SERVICE

Now Come the defendants, E. G. Nielson, Regional Director of the Bureau of Reclamation, Region No. III, United States Department of the Interior, and Lloyd G. Hudlow, Project Engineer, United States Bureau of Reclamation, Region No. III, United States Department of the Interior, by Jack D. H. Hays, United States Attorney for the District of Arizona, and Everett L. Gordon, Assistant United States Attorney for said District, and moves the Court as follows:

1. To quash the service had on these defendants because of lack of jurisdiction over the person.
2. To dismiss the above-entitled action because of improper venue.
3. To dismiss the above-entitled action because it is in effect an action against the United States of America, and the United States of America has not waived its sovereign immunity.
4. To dismiss the above-entitled action because Douglas McKay as Secretary of the Interior of the United States of America is an indispensable party defendant.
5. To dismiss the above-entitled action for the reason that plaintiff has a complete and adequate remedy at law.
6. To vacate the Temporary Restraining Order

and Order to Show Cause and dismiss the above-entitled action because it is against an officer or agency of the United States of America, and service was not had as required by Rule 4(d)(5) of the Federal Rules of Civil Procedure of the United States District Courts.

JACK D. H. HAYS,

United States Attorney for
the District of Arizona.

/s/ EVERETT L. GORDON,

Assistant United States
Attorney.

[Endorsed]: Filed January 11, 1955.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY,

JANUARY 17, 1955

(Prescott Division)

Honorable James A. Walsh, United States District
Judge, Presiding

Joseph S. Jenekes, Jr., Esquire, and Earl Carroll, Esquire, appear as counsel for the plaintiff. Everett Gordon, Esquire, Assistant United States Attorney, appears as counsel for the defendants E. G. Nielson, Lloyd G. Hudlow, E. A. Benson and Frederick C. Keller.

On motion of said Assistant United States Attorney,

It Is Ordered that Darrel B. McCrory, Esquire, is admitted specially to practice in this case.

On motion of Milton Cole, Esquire,

It Is Ordered that John H. Mathews, Esquire, is admitted specially to practice in this case.

Subsequently, Darrel B. McCrory, Esquire, and John H. Mathews, Esquire, appear on behalf of the defendants Aloysius L. Kunkel, Howard C. Schriber and Albert E. Hamilton.

The Motion to Dismiss of the defendants Aloysius L. Kunkel and Howard Schriber; the Motion to Dismiss or to Quash Service of the defendant Albert E. Hamilton; the Motion to Dismiss and to Vacate Temporary Restraining Order of the defendant E. A. Benson; and the Motions to Quash Service and to Dismiss of the Defendant E. G. Nielson come on regularly for hearing this day.

Said Motions are now duly argued by respective counsel, and

It Is Ordered that said Motions are submitted and by the Court taken under advisement, ruling on said Motions being reserved to Wednesday, January 19, 1955, at 2:00 o'clock p.m.

On stipulation of counsel,

It Is Ordered that this case is dismissed as to the defendants E. A. Benson and Frederick C. Keller.

[Title of District Court and Cause.]

MINUTE ENTRY OF WEDNESDAY,
JANUARY 19, 1955

Honorable James A. Walsh, United States District
Judge, Presiding

Joseph S. Jenckes, Jr., Esquire, is present for the plaintiff. John H. Mathews, Esquire, and Daniel McCrory, Esquire, are present for the defendants Aloysius L. Kunkel, Howard C. Schriber and Albert E. Hamilton. Everett Gordon, Esquire, Assistant United States Attorney, is present for the defendants E. G. Nielson and Lloyd G. Hudlow.

The Motion to Dismiss of the defendants Aloysius L. Kunkel and Howard Schriber; the Motion to Dismiss or to Quash Service of the defendant Albert E. Hamilton; the Motion to Dismiss and to Vacate Temporary Restraining Order of the defendant E. A. Benson, and the Motion to Quash Service and to Dismiss of the defendant E. G. Nielson having been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

It Is Ordered that the motions of the defendants E. G. Nielson, Lloyd G. Hudlow and Albert E. Hamilton to quash purported service of process are granted.

It Is Ordered that defendants' Motions to Dis-

miss are granted on the grounds that this is in reality a suit against the United States, and

It Is Ordered that defendants' Motions to Dismiss are granted on the grounds that the Secretary of the Interior is an indispensable party to this action.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,
JANUARY 21, 1955

Honorable James A. Walsh, United States District
Judge, Presiding

It Is Ordered that the complaint of the plaintiff be and the same hereby is dismissed upon the grounds and for the reasons that (1) the suit is in reality a suit against the United States which has not consented to be sued; and (2) the Secretary of the Interior is an indispensable party in the action.

It Is Further Ordered that the restraining order issued herein on December 24, 1954, be and the same hereby is quashed.

[Title of District Court and Cause.]

MOTION FOR RESTORATION AND CON-
TINUANCE OF RESTRAINING ORDER
PENDING APPEAL

Comes now the plaintiff and moves the Court for an Order restoring and continuing in effect the Restraining Order heretofore entered herein on De-

ember 24, 1954, pending the appeal to the United States Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 21st day of January, 1955, dismissing plaintiff's Complaint and quashing the aforesaid Restraining Order, Notice of Appeal therefrom having been filed by plaintiff on the 24th day of January, 1955, and for grounds of this Motion defendants refer to the allegations of plaintiff's Complaint herein disclosing that plaintiff will suffer irreparable injury unless said Restraining Order is restored and continued in effect pending said appeal. In making this Motion plaintiff consents and agrees that the Court may condition the restoration and continuance of said Restraining Order upon plaintiff's giving security in such sum as the Court deems proper for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained or which may be suffered by any other person, firm, corporation or political entity as a result of wrongful restraint.

Dated this 24th day of January, 1955.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ J. S. JENCKES, JR.,

Service of Copy acknowledged.

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiff above named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 21st day of January, 1955, dismissing plaintiff's Complaint and quashing the Restraining Order issued herein on December 24, 1954.

Dated this 24th day of January, 1955.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ J. S. JENCKES, JR.,
Attorneys for Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

COST BOND

Know All Men by These Presents, That we, Citizens Utilities Company, as Principal and Hartford Accident & Indemnity Company, as Surety, are held and firmly bound unto the defendants, E. G. Nielson, Lloyd G. Hudlow, Aloysius L. Kunkel and Howard C. Schriber in the sum of Two Hundred Fifty Dollars (\$250.00) to be paid to said defendants, their

successors and assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally.

Whereas, on the 21st day of January, 1955, a judgment was entered in the above-entitled action against the plaintiff therein, and the said plaintiff has duly filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit,

Now, Therefore, the condition of this Bond is that if the said plaintiff shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Court of Appeals may award if the judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

CITIZENS UTILITIES
COMPANY,

By /s/ J. S. JENCKES, JR.,
Its Attorney, Principal.

[Seal] HARTFORD ACCIDENT &
INDEMNITY COMPANY

By /s/ JOHN B. HALDIMAN,
Attorney-in-Fact, Surety.

State of Arizona,
County of Maricopa—ss.

This instrument was acknowledged before me this 24th day of January, 1955, by Jos. S. Jenckes, Jr., as attorney for Citizens Utilities Company.

[Seal] /s/ ALICE J. FITCH,
Notary Public.

My commission expires March 4, 1956.

State of Arizona,
County of Maricopa—ss.

On this, the 24th day of January, 1955, before me, Mary Henneberry, the undersigned officer, personally appeared John B. Haldiman, known to me (or satisfactorily proven) to be the person whose name is subscribed as attorney-in-fact for Hartford Accident & Indemnity Company, and acknowledged that he executed the same as the act of his principal for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official seal.

[Seal] /s/ MARY HENNEBERRY,
Notary Public.

My commission expires June 30, 1956.

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

State of Arizona,
County of Maricopa—ss.

E. A. Benson, being first duly sworn, deposes and says, that he is the Project Manager of the Parker-Davis Project, Bureau of Reclamation, United States Department of the Interior; that as such Project Manager he is in charge of construction, operation, maintenance, management and administration of the Davis Dam and Parker Dam Power

Plants, including transmission line facilities connected therewith and relating thereto; that at 12:01 a.m. on the 22nd day of January, 1955, pursuant to the request of the Arizona Power Authority electric energy in a total maximum amount of 6,000 kilowatts at a voltage of 69,000 volts was delivered and is being presently delivered at the point of interconnection between the Davis-Kingman 69,000 volt tap line of the Bureau of Reclamation and the Hoover-Kingman 69,000 volt line of the Citizens Utilities Company and at a second point of delivery at the Bullhead City Substation in the vicinity of Davis Dam, which Substation is owned by the Mohave Electric Cooperative, a customer of the Citizens Utilities Company; that delivery of electric energy generated at Hoover Dam which was delivered to Citizens was terminated at 12:01 a.m. on the 22nd day of January, 1955; that your affiant is informed and believes that Citizens Utilities Company entered into temporary arrangements with the Arizona Power Authority for an "emergency" power supply until February 12, 1955, and that Arizona Power Authority is willing to negotiate with Citizens Utilities Company and, if and when requested by it, to attempt to secure delivery of a firm supply of electric energy in substitution of electric energy theretofore delivered to Citizens Utilities Company by the United States; and further your affiant is informed and believes that Citizens Utilities Company has fixed a time and place for commencement of negotiations with the Arizona Power Authority for delivery of such firm

energy. Finally, your affiant states that in his opinion and belief there are sources of energy that can be made available for delivery to Citizens Utilities Company.

/s/ E. A. BENSON.

Subscribed and sworn to before me, a Notary Public, this 31st day of January, 1955.

[Seal] /s/ AURELIA E. HULL,
Notary Public.

My commission expires 6/22/56.

[Endorsed]: Filed January 31, 1955.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, JAN. 31, 1955

Plaintiff's Motion for Restoration and Continuance of Restraining Order Pending Appeal comes on regularly for hearing this day. Joseph S. Jenckes, Jr., Esquire, appears as counsel for the Plaintiff. John H. Mathews, Esquire, and Daniel McCrory, Esquire, appear as counsel for the defendants Aloysius L. Kunkel, Howard C. Schriber and Albert E. Hamilton. Everett Gordon, Esquire, Assistant United States Attorney, appears as counsel for the defendants E. G. Nielson and Lloyd G. Hudlow.

Patricia Todd is now duly sworn to act as Court Reporter herein.

Said Motion for Restoration and Continuance of Restraining Order Pending Appeal is now duly argued by respective counsel, and

It Is Ordered that said Motion for Restoration and Continuance of Restraining Order Pending Appeal is denied.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Arizona—ss.

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Citizens Utilities Company, a corporation, Plaintiff, vs. E. G. Nielson, Lloyd G. Hudlow, Aloysius L. Kunkel, Howard C. Schriber, Albert E. Hamilton, Defendants, numbered Civil 427 Prescott, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the civil docket entries and minute entries are true and correct copies of the originals thereof remaining in my office in the City of Tucson, State and District aforesaid.

I further certify that said original documents, and

said copies of the civil docket entries and of the minute entries, constitute the record on appeal in said case, as designated in the Designation of Contents of Record on Appeal filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Civil Docket Entries, including Clerk's notation of entry of order dismissing.
2. Complaint, filed December 24, 1954.
3. Temporary Restraining Order and Order to Show Cause, entered and filed December 24, 1954.
4. Bond for Temporary Restraining Order, filed December 24, 1954.
5. Minute entry of December 31, 1954, (Continuing Return Day on Order to Show Cause and increasing bond on Temporary Restraining Order).
6. Bond for Temporary Restraining Order, filed December 24, 1954.
7. Summons with Marshal's Return, filed January 4, 1955.
8. Motion to Dismiss of the defendants Aloysius L. Kunkel and Howard C. Schriber, filed January 11, 1955.
9. Motion to Dismiss of the defendant Albert E. Hamilton, filed January 11, 1955.
10. Motion to Dismiss and to Vacate Temporary Restraining Order of the defendants E. A. Benson and Frederick C. Keller, filed January 11, 1955.
11. Memorandum in Support of the Motion of the defendants E. A. Benson and Frederick C. Keller, filed January 11, 1955.

12. Motion to Dismiss and to Quash Service of the defendants E. G. Nielson and Lloyd G. Hudlow, filed January 11, 1955.

13. Memorandum in Support of the Motion of defendants E. G. Nielson and Lloyd G. Hudlow, filed January 11, 1955.

14. Notice of Hearing of Defendants' Motions, filed January 11, 1955.

15. Minute entry of January 17, 1955 (hearing on defendants' motions).

16. Minute entry of January 19, 1955 (order granting defendants' motions to dismiss).

17. Memorandum in Opposition to Defendants' Motions to Dismiss, filed January 20, 1955.

18. Minute entry of January 21, 1955 (order dismissing Complaint and quashing Restraining Order).

19. Reporter's Transcript of Proceedings of Hearing, filed January 21, 1955.

20. Plaintiff's Motion for Restoration and Continuance of Restraining Order Pending Appeal, filed January 24, 1955.

21. Minute entry of January 24, 1955 (order shortening time for hearing of Plaintiff's Motion for Restoration and Continuance of Restraining Order Pending Appeal and fixing time for hearing).

22. Plaintiff's Notice of Appeal, filed January 24, 1955.

23. Plaintiff's Cost Bond on Appeal, filed January 24, 1955.

24. Plaintiff's Designation of Contents of Record on Appeal, filed January 24, 1955.

25. Defendants' Memorandum in Opposition to Plaintiff's Motion to Restore Temporary Restraining Order, filed January 31, 1955.

26. Affidavit of E. A. Benson, Project Manager of the Parker-Davis Project, Bureau of Reclamation, United States Department of the Interior, filed January 31, 1955.

27. Minute entry of January 31, 1955 (order denying Plaintiff's Motion for Restoration and Continuance of Restraining Order Pending Appeal).

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$3.20 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Tucson, Arizona, this 5th day of February, 1955.

[Seal]

WM. H. LOVELESS,
Clerk;

By /s/ CATHERINE A. DOUGHERTY,
Chief Deputy.

[Endorsed]: No. 14644. United States Court of Appeals for the Ninth Circuit. Citizens Utilities Company, a Corporation, Appellant, vs. E. G. Nielson, Lloyd G. Hudlow, Aloysius L. Kunkel, Howard C. Schriber, and Albert A. Hamilton, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed February 7, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14644

CITIZENS UTILITIES COMPANY, a Corporation,
Appellant,

Appellant,

vs.

E. G. NIELSON, LLOYD G. HUDLOW,
ALOYSIUS L. KUNKEL, HOWARD C.
SCHRIBER, and ALBERT E. HAMILTON,
Appellees.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Statement of Points

Comes now the Appellant and pursuant to Rule 17(6) of the rules of this Court submits a concise statement of the points on which it intends to rely:

1. In quashing the service of summons and dismissing the Complaint as to the Appellees E. G. Nielson and Lloyd G. Hudlow, the lower court erred for the reason that said Appellees appeared by their attorney on the 31st day of December, 1954, and consented to the continuance of the temporary restraining order theretofore entered herein and to the hearing of the order to show cause why a temporary injunction should not be granted upon the 17th day of January, 1955, conditioned upon Appellant being required to increase the bond on temporary restraining order to the sum of Ten Thousand Dollars (\$10,000) and thereby submitted themselves to the jurisdiction of the Court and waived their privilege of objecting to the jurisdiction of the Court upon the ground of improper venue.

2. In dismissing the Complaint upon the motion of Appellees Aloysius L. Kunkel and Howard C. Schriber the lower court erred for the reason that the Complaint stated a cause of action against the Appellees Nielson, Hudlow, Kunkel and Schriber for injunctive relief in that:

(a) Appellees are in control of the electrical generating and distribution facilities of the Hoover Dam Power Plant.

(b) Under the provisions of Section 5 of the Boulder Canyon Project Act (43 U.S.C.A., §1617(d)), Appellant is entitled to a continuation of the delivery to it of Hoover Dam electrical power in the manner and upon the terms and conditions

under which it was receiving such electrical power during the year 1954 and prior thereto.

(c) The threats of the Appellees to discontinue the delivery of electrical energy to Appellant (and their actual discontinuance of such deliveries subsequent to the quashing of the temporary restraining order herein) are illegal and are beyond or in want of statutory authority and may be corrected by suit against them individually; this is not an action against the United States.

(d) Appellees are withholding electrical energy from Appellant in excess of and contrary to the powers conferred upon them; a decree of injunction herein will effectively grant the relief desired by expending itself upon subordinate officials or agents who are before the Court; the Secretary of the Interior is not an indispensable party.

(e) Appellant does not have an adequate remedy at law.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ J. S. JENCKES, JR.,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 15, 1955.

No. 14645

United States
Court of Appeals
for the Ninth Circuit

FRED I. PUTNAM and JAMES A. OVERMAN,
Appellants,
vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE
S. HERNING, EDGAR L. PEECHER,
WILLIAM E. BARQUIST and NORMAN L.
BUNKER, Appellees.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division

FILED
JUL 15 1957

No. 14645

United States
Court of Appeals
for the Ninth Circuit

FRED I. PUTNAM and JAMES A. OVERMAN,
Appellants,
vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE
S. HERNING, EDGAR L. PEECHER,
WILLIAM E. BARQUIST and NORMAN L.
BUNKER, Appellees.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer and Affirmative Defenses of Respondent Tobin to Libel and Intervening Libels..	46
Exhibit A—Form of Contract for Working Share on Silver Spray	49
 Appeal:	
Assignments of Error on	84
Certificate of Clerk to Transcript of Record on	91
Notice of	83
Statement of Points Relied Upon on (DC)..	90
Stipulation on Evidence, Issues and Pleadings on (Excerpt-USCA)	292
Supersedeas Bond on	88
Supplemental Certificate of Clerk to Transcript of Record on	92
Assignments of Error	84
Certificate of Clerk to Transcript of Record..	91
Supplemental	92
Decree	77
Findings of Fact and Conclusions of Law.....	63

Intervening Libel of:	
William E. Barquist and Edgar L. Peecher..	20
George S. Herning	27
John Kadlec, Doss R. Payne and Norman L. Bunker	12
Intervening Libel in Rem and in Personam (Putnam and Overman)	33
Libel of Harry C. Lower.....	3
Monition and Attachment:	
Filed June 15, 1954	7
Filed Aug. 30, 1954	41
Names and Addresses of Proctors.....	1
Notice of Appeal	83
Order Authorizing Withdrawal of Proctor Robert Wells for John Kadlec.....	31
Order Confirming Sale of Vessel.....	87
Reply of Intervening Libelants:	
Norman Bunker	54
George S. Herning	57
Edgar L. Peecher and William Barquist....	59
Reply of Libelant Harry C. Lower.....	52
Statement of Points Relied Upon by Appel- lants Putnam and Overman (DC).....	90
Stipulation on Evidence, Issues and Pleadings on Appeal (Excerpt-USCA).....	292
Supersedeas Bond on Appeal	88

Supplemental Certificate of Clerk to Transcript of Record	92
Transcript of Proceedings and Testimony....	94
Oral Decision of the Court	278
Witnesses:	
Barquist, William	
—direct (Armstrong)	191
—cross (Collins)	198
—cross (Carey)	203
Bender, George D.	
—direct (Collins)	230
—voir dire (Crutcher)	231
Bunker, Norman L.	
—direct (Wells)	204
—cross (Collins)	210
—cross (Carey)	211
Gehrig, James T.	
—direct (Collins)	267
—cross (Armstrong)	271
—cross (Crutcher)	273
Herning, George S.	
—direct (Allison)	143
—cross (Collins)	151
—cross (Carey)	157
—redirect (Allison)	159
—recross (Carey)	159
—rebuttal, direct (Allison).....	275

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Kadlec, John

—direct (Crutcher)	132
—cross (Collins)	137
—direct (Crutcher)	213
—cross (Collins)	214
—cross (Carey)	218
—redirect (Crutcher)	218

Lower, Fern

—direct (Crutcher)	127
—cross (Collins)	130
—cross (Carey)	131

Lower, Harry C.

—direct (Crutcher)	95
—cross (Collins)	109, 124
—cross (Carey)	120
—redirect (Crutcher)	124
—rebuttal, direct (Crutcher)	274

Peecher, Edgar L.

—direct (Armstrong)	160
—cross (Collins)	171
—cross (Carey)	178

Petrich, Hervey

—direct (Crutcher)	179
—cross (Carey)	187
—redirect (Crutcher)	189

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Swontkoski, Joseph F.

—direct (Collins) 220, 221

—cross (Crutcher) 222

Tobin, Robert J.

—direct (Collins) 221, 223, 234

—cross (Crutcher) 245

—cross (Armstrong) 260

—cross (Allison) 265

—redirect (Collins) 266

NAMES AND ADDRESSES OF PROCTORS:

WILLIAM H. BOTZER of Messrs. Peyser, Car-
tano, Botzer & Chapman,
1415 Joseph Vance Bldg., Seattle 1, Wash.

Proctor for Appellants, Fred I. Putnam
and James A. Overman.

BOGLE, BOGLE and GATES,
M. BAYARD CRUTCHER,
603 Central Bldg., Seattle 4, Washington,
For Respondents Harry C. Lower and
John Kadlec.

ROBERT B. ALLISON,
400 Central Bldg., Seattle 4, Washington,
LEWIS S. ARMSTRONG,
760 Central Bldg., Seattle 4, Washington,
For Respondents George S. Herning, Ed-
gar L. Peecher and William E. Barquist.

ROBERT C. WELLS,
2703 Smith Tower, Seattle 4, Washington,
Proctor for Norman L. Bunker.

ANDERSON & COLLINS,
1114 Vance Bldg., Seattle, Washington.
Proctors for Robert J. Tobin.

In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
vs.

THE Oil Screw SILVER SPRAY, her engines,
tackle, apparel, furniture and equipment, and
ROBERT F. TOBIN, Respondents.

LIBEL

To the Honorable the Judges of the Above Entitled Court:

The libel of Harry C. Lower against the oil screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule For Seamen to Sue
Without Security and Prepayment of Fees

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

On or about April 17, 1954, the respondent Robert F. Tobin, as master of the said vessel, hired libelant as a member of the crew of said vessel for the 1954 tuna fishing season, on a 1/10th share of the catch, and represented to him that said vessel would engage in fishing for tuna from the Port of San Diego, California.

IV.

Thereafter and on or about April 21, 1954, libelant joined the said vessel at Seattle, Washington, and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to libelant and the other crew members to be a shake-down cruise preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to the libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then failed and refused to rejoin the vessel, and has since

failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

Libelant left the said vessel at the Port of Seattle on June 5, 1954, the said owner being absent and his whereabouts still unknown. Libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

On information and belief, libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to libelant by the respondent Tobin.

IX.

Libelant's services on board the said vessel between March 21, 1954, and June 5, 1954, were reasonably worth the sum of \$600.00.

X.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libelant prays:

1. That process in due form of law according to the course and practice of this Court in causes of admiralty and maritime jurisdiction may issue against the said oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, and that all persons having any interest therein

may be cited to appear and answer under oath all and singular the matters aforesaid.

2. That the said respondent Robert F. Tobin be required to appear and answer all and singular the matters aforesaid.

3. That the court enter a decree herein for libelant in the sum of \$5,000.00, and libelant's costs, and that the said vessel, her engines, tackle, apparel, furniture and equipment be sold in the manner provided by law to answer the decree for the amount adjudged due to libelant herein, and that libelant do have and recover of the respondent Robert F. Tobin the amount of any deficiency resulting from the sale of said vessel, and that judgment therefor against said respondents be entered herein in the manner provided by law.

4. That the Court shall direct the manner in which actual notice of the commencement of this suit shall be given by libelant to the master or other ranking officer or caretaker of the said oil screw vessel Silver Spray, and to any person who has recorded a notice of claim for any undischarged lien upon said vessel as provided in Section 30 of the Ship Mortgage Act, 1920.

5. That libelant have such other and further relief as in the premises he may be entitled to receive.

/s/ BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,

/s/ M. BAYARD CRUTCHER,

Proctors for Libelant

Duly Verified.

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

MONITION AND ATTACHMENT

The President of the United States of America
To the Marshal of the United States for the Western District of Washington, Greeting:

Whereas, a Libel hath been filed in the United States District Court for the Western District of Washington, on the 10th day of June, in the year of our Lord one thousand nine hundred and fifty four, by Harry C. Lower, Libellant vs. The Oil Screw Silver Spray, her engines, tackle, apparel, furniture and equipment, and Robert F. Tobin, Respondents, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf be made, and that all persons interested in the said Oil Screw Silver Spray, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said Oil Screw Silver Spray, her tackle, etc., may for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the Libellant.

You Are Therefore Hereby Commanded to attach the said Oil Screw Silver Spray, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear

before the said Court, to be held at Seattle, in the Western District of Washington, on the 30th day June, A.D. 1954, at 10 o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof together with this writ.

Witness, the Hon. John C. Bowen, Judge of said Court, at the City of Seattle, in the Western District of Washington, this 10th day of June in the year of our Lord one thousand nine hundred and fifty four and of our independence the one hundred and seventy-eighth.

MILLARD P. THOMAS,

Clerk

/s/ By J. THORNBURGH,

Deputy Clerk

Marshal's Return

I hereby certify and return that in obedience to the attached Monition and Attachment, I attached the Oil Screw Silver Spray, her engines, tackle, apparel, furniture and equipment, at Seattle, Washington, at 3:35 p.m. June 10, 1954, and have her in my custody. I have given due notice to all persons claiming the same, or knowing or having anything to say why same should not be condemned and sold pursuant to the prayer of the Libel, that they

be and appear before this Court to be held at Seattle in the Western District of Washington, on the 30th day of June, 1954, by causing a Notice to be published in The Daily Journal of Commerce, Seattle, Washington, on the 12th day of June, 1954, and by posting like Notice on the seized Oil Screw Silver Spray, at 1515 Fairview Avenue North, Seattle.

A true copy of the Monition and Attachment, with copy of Libel, was served on Helge G. Oger, engineer on board the boat, at 1515 Fairview Avenue North, Seattle, Washington, in whose custody I found the above Oil Screw Silver Spray.

W. B. PARSONS, U. S. Marshal

/s/ By PYRL J. FORCIER, Deputy

Marshal's fee, \$2.00; Expense, 40c; Advertising, \$14.00; Total, \$16.40.

Affidavit of Publication

State of Washington,
County of King—ss.

L. J. Brown, being first duly sworn, on oath deposes and says that he is the business manager and one of the publishers of The Daily Journal of Commerce, a daily newspaper. That said newspaper is a legal newspaper and it is now and has been for more than six months prior to the date of the publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now

and during all of said time was printed in an office maintained at the aforesaid place of publication of said newspaper. That the said Daily Journal of Commerce was on the 12th day of June, 1941, approved as a legal newspaper by the Superior Court of said King County.

That the annexed is a true copy of U. S. Marshal's Notice as it was published in the regular issue (and not in supplement form) of said newspaper on the 12th day of June, 1954, and that said newspaper was regularly distributed to its subscribers during all of said period.

/s/ L. J. BROWN

Subscribed and sworn to before me this 12th day of June, 1954.

[Seal] /s/ E. CAMPBELL,
Notary Public in and for the State of Washington,
residing at Seattle.

U. S. Marshal's Notices

Notice. Whereas, on the 10th day of June, 1954, Harry C. Lower, Libelant, by Bogle, Bogle & Gates of Seattle, Washington, Proctors for Libelant, filed a libel in the District Court of the United States for the Western District of Washington, against the Oil Screw Silver Spray, her engines, tackle, apparel, furniture and equipment, and Robert F. Tobin, Respondents, in a cause of action civil and maritime, numbered 16039, for damages in the sum of \$5,000.00. And whereas, by virtue of process in due form of law, to me directed, I have attached

and retain the same in my custody. Notice is hereby given to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said court, to be held at Seattle, Washington, in the Western District of Washington, on the 30th day of June, A.D. 1954, at ten o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. W. B. Parsons, U. S. Marshal. (3224-M)

[Endorsed]: Filed June 15, 1954.

F. I. Putnam and J. A. Overman vs.

In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
JOHN KADLEC, DOSS R. PAYNE, and NOR-
MAN L. BUNKER, Intervening Libelants,

VS.

THE Oil Screw SILVER SPRAY, her engines,
tackle, apparel, furniture and equipment, and
ROBERT F. TOBIN, Respondents.

INTERVENING LIBEL

To the Honorable the Judges of the Above Entitled
Court:

The intervening libel of John Kadlec against the oil screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That on or about April 14, 1954, the respondent Robert F. Tobin, as master of said vessel, hired intervening libelant Kadlec as a member of the crew of said vessel for the 1954 tuna fishing season; that said intervening libelant was hired on the basis of 1/10th share of the catch; that it was represented to said intervening libelant that said vessel would engage in fishing for tuna during the 1954 fishing season from some port in the State of California.

IV.

That thereafter, and on or about April 23, 1954, this intervening libelant joined the said vessel at Seattle, Washington and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to this intervening libelant and the other crew members to be a shake-down cruise preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to this intervening libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then failed and refused to rejoin the vessel, and has since failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

This intervening libelant left the said vessel at the Port of Seattle on June 5, 1954, the said owner being absent and his whereabouts still unknown. This intervening libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

On information and belief, this intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to intervening libelant by the respondent Tobin.

IX.

This intervening libelant's services on board the said vessel between April 23, 1954, and June 5, 1954, were reasonably worth the sum of \$400.00.

X.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

The intervening libel of Doss R. Payne against the oil screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That during the month of March, 1954, the respondent Robert F. Tobin, as master of the said vessel, hired this intervening libelant as a member of the crew of said vessel for the 1954 fishing season on a 1/10th share of the catch, and represented to him that said vessel would engage in fishing for tuna from San Diego, California.

IV.

That thereafter, and during the month of April,

1954, this intervening libelant joined the said vessel at Seattle, Washington, and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

That during the month of May, 1954, respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to be a shake-down cruise preliminary to the use of said ship for the tuna fishing season; that at Ketchikan, Alaska, said respondent Tobin unjustifiably and without cause discharged this intervening libelant and directed his removal from said vessel; that said intervening libelant has not received any wages whatsoever for the said voyage of the said vessel to Alaska or any wages whatsoever, and was discharged without his consent and without any fault on his part.

VI.

That on information and belief this intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000 had the said fishing venture been fulfilled as promised, and had this intervening libelant not been wrongfully discharged from the services of said vessel.

VII.

That this intervening libelant's services on board the said vessel during the months of March, April, May and June, 1954, was reasonably worth the sum of \$700.00.

VIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

The intervening libel of Norman L. Bunker against the oil screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That on or about June 2, 1954, respondent Robert F. Tobin, as master of the said vessel, hired intervening libellant Bunker as a member of the crew of said vessel for the 1954 tuna fishing season on a 1/10th share of the catch, and represented to him

that said vessel would engage in fishing for tuna from the Port of San Diego, California; that said respondent further represented to intervening libelant Bunker that there was an experienced bait and refrigeration man aboard said vessel, and that the same would be provisioned and sent to San Diego, California.

IV.

That thereafter and on or about June 4, 1954, intervening libelant Bunker joined the said vessel at Seattle, Washington, ready, willing and able to perform his duties in the service thereof; that this intervening libelant stood by, ready, willing, qualified and able to perform all duties and services required aboard said ship until approximately June 14, 1954; that respondent Tobin failed and refused to join said vessel and has ever since failed to provide the vessel with any funds, provisions or outfit, or to send said vessel to sea.

V.

That intervening libelant Bunker left said vessel at the Port of Seattle, Washington, the said owner being absent and his whereabouts unknown; that this intervening libelant has been discharged without receiving any wages whatsoever or the return of his consideration and without any fault on his part; the said vessel and its owner have ever since failed and refused to perform their said obligations under the agreement hereinbefore set out, thereby depriving this intervening libelant of his services and return of services to said ship had said agreement been fulfilled; that each and every perform-

ance required of this intervening libelant in the service of said vessel and of respondent Tobin have been performed.

VI.

On information and belief, this intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to intervening libelant by the respondent Tobin.

VII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, intervening libelants pray:

1. That each of them shall be allowed to intervene and be heard in this cause and that all persons having any interest therein may be cited to appear and answer under oath all and singular the matters aforesaid;

2. That the said respondent, Robert F. Tobin, be required to appear and answer all and singular the matters aforesaid;

3. That the court enter a decree herein for intervening libelants John Kadlec, Doss R. Payne and Norman L. Bunker in the sum of \$5,000.00 and each intervening libelant's costs, respectively, and that said vessel, her engines, tackle, apparel, furniture and equipment, be sold in the manner provided by law to answer the decree for the amount adjudged due to intervening libelants herein, respec-

tively, and that intervening libelants respectively and each of them do have and recover of the respondent Robert F. Tobin the amount of any deficiency resulting from the sale of said vessel, and that judgment therefor against said respondent be entered herein in the manner provided by law;

4. That these intervening libelants have such other and further relief, respectively, as they may be entitled to receive herein.

/s/ ROBERT C. WELLS,
Proctor for Intervening Libelants.

Duly Verified.

[Endorsed]: Filed July 26, 1954.

In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
JOHN KADLEC, DOSS R. PAYNE and NORMAN L. BUNKER, Intervening Libelants,
WILLIAM E. BARQUIST and EDGAR L. PEECHER, Additional Intervening Libelants,

vs.

THE Oil Screw SILVER SPRAY, etc., et al.,
Respondents.

INTERVENING LIBEL

To the Honorable Judges of the Above Entitled Court:

The intervening libel of William E. Barquist

against the oil screw Silver Spray of Seattle, Washington, official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That on or about May 4, 1954 the respondent Robert F. Tobin, as master of said vessel, hired additional intervening libelant William E. Barquist as a member of the crew of said vessel for the 1954 tuna fishing season; that said additional intervening libelant was hired on the basis of 1/10th share of the catch; that it was represented to said additional intervening libelant that said vessel would engage in fishing for tuna during the 1954 fishing season from some port in the State of California.

IV.

That thereafter, and on or about May 4, 1954 this additional intervening libelant joined the said vessel at Seattle, Washington and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to this additional intervening libelant and the other crew members to be a shake-down cruize preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to this additional intervening libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then failed and refused to rejoin the vessel, and has since failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

This additional intervening libelant left the said vessel approximately one month after boarding the vessel, the said owner being absent and his whereabouts unknown. This additional intervening libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

On information and belief, this additional intervening libellant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to additional intervening libellant by the respondent Tobin.

IX.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

The intervening libel of Edgar L. Peecher against the oil screw Silver Spray of Seattle, Washington, official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent, Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters

within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That during the month of April, 1954, the respondent Robert F. Tobin, as master of the said vessel, hired this additional intervening libelant as a member of the crew of said vessel for the 1954 fishing season on a 1/10th share of the catch, and represented to him that said vessel would engage in fishing for tuna from San Diego, California.

IV.

That thereafter, and during the month of April, 1954, this additional intervening libelant joined the said vessel at Seattle, Washington, and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to this additional intervening libelant and the other crew members to be a shake-down cruise preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to this additional intervening libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then

failed and refused to rejoin the vessel, and has since failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

This additional intervening libelant left the said vessel approximately one month after boarding the vessel, the said owner being absent and his whereabouts unknown. This additional intervening libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

That on information and belief this additional intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00 had the said fishing venture been fulfilled as promised, and had this additional intervening libelant not been wrongfully discharged from the services of said vessel.

IX.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, additional intervening libelants pray:

1. That each of them shall be allowed to intervene and be heard in this cause and that all persons having any interest therein may be cited to

appear and answer under oath all and singular the matters aforesaid;

2. That the said respondent, Robert F. Tobin, be required to appear and answer all and singular the matters aforesaid;

3. That the court enter a decree herein for additional intervening libelants, William E. Barquest and Edgar L. Peecher, in the sum of \$5,000.00 each and each additional intervening libelant's costs, respectively, and that said vessel, her engines, tackle, apparel, furniture and equipment, be sold in the manner provided by law to answer the decree for the amount adjudged due to additional intervening libelants herein, respectively, and that additional intervening libelants respectively, and each of them, do have and recover of the respondent Robert F. Tobin the amount of any deficiency resulting from the sale of said vessel, and that judgment therefor against said respondent be entered herein in the manner provided by law.

4. That these additional intervening libelants have such other and further relief, respectively, as they may be entitled to receive herein.

/s/ LEWIS S. ARMSTRONG,

Proctor for Additional Intervening
Libelants.

Acknowledgment of Service attached.

Duly Verified.

[Endorsed]: Lodged August 12, 1954.

[Endorsed]: Filed August 16, 1954.

In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
JOHN KADLEC, et al., Intervening Libelants,
GEORGE S. HERNING, Intervening Libelant,

vs.

THE Oil Screw SILVER SPRAY, etc., et al.,
Respondents.

INTERVENING LIBEL

To the Honorable Judges of the Above Entitled Court:

The intervening libel of George S. Herning against the Oil Screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That on or about the 27th day of April, 1954, the respondent Robert F. Tobin, as master of said vessel, hired intervening libelant Herning as a member of the crew of said vessel for the 1954 tuna fishing season; that said intervening libelant was hired on the basis of 1/10th share of the catch; that it was represented to said intervening libelant that said vessel would engage in fishing for tuna during the 1954 fishing season from some port in the State of California.

IV.

That thereafter, and on or about April 28, 1954, this intervening libelant joined the said vessel at Seattle, Washington and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to this intervening libelant and the other crew members to be a shake-down cruise preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to this intervening libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then failed and refused to rejoin the vessel, and has since failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

This intervening libelant left the said vessel at the Port of Seattle on June 5, 1954, the said owner being absent and his whereabouts still unknown. This intervening libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

On information and belief, this intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to intervening libelant by the respondent Tobin.

IX.

This intervening libelant's services on board the said vessel between April 28, 1954 and June 5, 1954, were reasonably worth the sum of \$800.00.

X.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, intervening libelant prays:

1. That he shall be entitled to intervene and be heard in this cause and that all persons having any interest therein may be cited to appear and answer under oath all and singular the matters aforesaid;

2. That the said respondent, Robert F. Tobin, be required to appear and answer all and singular the matters aforesaid;

3. That the court enter a decree herein for intervening libelant George S. Herning in the sum of \$5,000.00 and intervening libelant's costs, and that said vessel, her engines, tackle, apparel, furniture and equipment, be sold in the manner provided by law to answer the decree for the amount adjudged due to intervening libelant herein, and that intervening libelant have and recover of the respondent Robert F. Tobin the amount of any deficiency resulting from the sale of said vessel, and that judgment therefor against said respondent be entered herein in the manner provided by law;

4. That the intervening libelant have such other and further relief as he may be entitled to receive herein.

/s/ ROBERT B. ALLISON,
Proctor for Intervening Libelant.

Acknowledgment of Service attached.

[Endorsed]: Lodged August 12, 1954.

[Endorsed]: Filed August 16, 1954.

[Title of District Court and Cause.]

ORDER AUTHORIZING WITHDRAWAL OF
PROCTOR

This matter having come on for hearing on August 16, 1954, upon the motion of Robert C. Wells for an order authorizing his withdrawal as proctor for intervening libelants John Kadlec, said motion being supported by the affidavit of said Payne and the affidavit of said Kadlec, containing the written consent of said intervening libelants to the withdrawal of said Robert C. Wells, and upon the affidavit of said Wells that differences have arisen between him and said intervening libelants and that said intervening libelants intended to proceed herein with other counsel, and the Court having considered the records and files herein and being fully informed in the premises, it is now

Ordered that the motion for order authorizing withdrawal as proctor by Robert C. Wells, should be, and the same is hereby granted as to John Kadlec.

Done in Open Court this 16th day of August, 1954.

/s/ JOHN C. BOWEN,
Judge.

Approved and presented by:

/s/ ROBERT C. WELLS,

Proctor for Intervening Libelants.

Approved and Notice of Presentation Waived:

/s/ M. BAYARD CRUTCHER,
of Proctor for Libelant.

Copy received and approved as to form:

/s/ LEONARD COLLINS,
of Proctors for Respondent and
Claimant, Robert F. Tobin.

Copy received and approved as to form:

/s/ LEWIS S. ARMSTRONG,
Proctor for additional intervening
libelants.

Copy received and approved as to form:

/s/ ROBERT B. ALLISON,
Proctor for intervening libelant,
George S. Herning.

Acknowledgment of Service attached.

[Endorsed]: Filed August 16, 1954.

In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
vs.

THE Oil Screw SILVER SPRAY, etc., et al.,
Respondents.

JOHN KADLEC, et al., Intervening Libelants,
FRED I. PUTNAM and JAMES A. OVERMAN,
Additional Intervening Libelant.

INTERVENING LIBEL IN REM AND IN
PERSONAM

To the Honorable Judges of the United States District Court for the Western District of Washington, Northern Division:

Come now Fred I. Putnam and James A. Overman, intervening libelants in rem and in personam, and allege as follows:

I.

The Oil Screw "Silver Spray", respondent, registered for fishing and freight; length 77.5 feet, breadth 15.1 feet, depth 7.8 feet; is now within the Western District of Washington, Northern Division, and within the jurisdiction of this Honorable Court, and all libellants and the respondents above named, as parties to these admiralty proceedings are within the jurisdiction of this Honorable Court.

II.

Prior to April 28, 1954, these intervening libellants (hereinafter referred to as "Putnam" and "Overman") agreed to sell and did sell the Oil Screw "Silver Spray" to respondent Robert F. Tobin (hereinafter referred to as "Tobin") for the agreed purchase price of \$35,000.00, of which Tobin made a down payment of \$5,000.00, and on April 28, 1954, Tobin, as evidence of the balance due, executed and delivered to Putnam and Overman his promissory note in the principal sum of \$30,000.00 with the following conditions and provisions, namely:

\$30,000.00 Instalment Note No.....

Seattle, Wash., April 28, 1954

For value received, I promise to pay to the order of Fred I. Putnam and James A. Overman, seven-twelfths and five-twelfths, respectively, Thirty Thousand and 00/100 (\$30,000.00) Dollars in Lawful Money of the United States of America, with interest thereon in like Lawful Money at the rate of 5 per cent per annum from date until paid, payable in 2 installments each year \$2500 or more in any one payment, including the full amount of interest due on this note at time of payment of each instalment. The first payment to be made on the 1st day of September, 1954, and a like payment on each June 1st and each September 1st thereafter until the whole sum, principal and interest, has been paid; if any of said instalments are not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the

holder hereof. And in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Due September 1, 1961 at Seattle, Washington.

ROBERT J. TOBIN

(Robert J. Tobin)

III.

In order to secure the payment of the principal and interest of said promissory note above set forth, Tobin, as mortgagor, executed and delivered to Putnam and Overman, as mortgagees, a first, preferred mortgage dated April 28, 1954, and by the terms and provisions of said first, preferred mortgage Tobin admitted that he was justly indebted to Putnam and Overman as mortgagees in the sum of \$30,000.00, plus interest as therein provided, and granted, bargained, sold, and mortgaged unto said mortgagees the whole of the said Oil Screw "Silver Spray", together with her mast, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel, furniture and all other necessities thereunto pertaining and belonging, and said mortgage provided that if Tobin should pay or cause to be paid to the said mortgagees the debt aforesaid, together with interest as provided, and if said mortgagor should keep, perform and observe all and singular the covenants and promises in said promissory note and in the said mortgage, then the said mortgage and

the estate and rights thereby granted should cease, determine and be void; otherwise, to remain in full force and effect. That in fact Tobin violated the provisions of said mortgage in the following particulars:

1. By his failure to pay premiums he has caused a forfeiture of insurance coverage as provided for in the mortgage.

2. He has permitted the "Silver Spray" to be attached by The United States Marshal of this district.

3. He has declared that he cannot, and will not, make the \$2500.00 payment due September 1, 1954 as provided for in said promissory note.

4. By such violations the mortgagees deem themselves in danger of losing the debt and the whole thereof.

IV.

At the time the said first, preferred mortgage was executed, the said Oil Screw "Silver Spray" was and still is duly registered under the laws of the United States of America, having its home port at Seattle, State of Washington. The said first, preferred mortgage was duly filed for record in the Office of the Collector of Customs of the Port of Seattle, State of Washington, and was duly recorded in said Office of the Collector of Customs in Book No. 15PM, instrument No. 95, at 2:20 o'clock p.m. on the 28th day of April, 1954, which said record shows the name of the vessel, the names of the parties to the mortgage, the interest in the vessel mortgaged, and the amount and date of maturity

on September 1, 1961, in accordance with Section 30, subsection "c" of the Ship Mortgage Act of Congress of the United States, June 5, 1920.

The said first, preferred mortgage was endorsed upon the documents of the Oil Screw "Silver Spray" in accordance with the provisions of Section 30 of the Ship Mortgage Act of June 5, 1920, and was recorded as provided by subsection "c" thereof. An affidavit was endorsed upon the said mortgage to the effect that the mortgage was made in good faith and without any design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel. The said mortgage expressly provided that the mortgagee did not waive the preferred status of said mortgage. All of the acts and things required to be done by the said Ship Mortgage Act of June 5, 1920 in order to give to the said mortgage status of a first, preferred mortgage, were duly done or caused to be done, either by mortgagee or by Collector of Customs of the Port of Seattle, State of Washington.

VI.

The Collector of Customs of the Port of Seattle, State of Washington, upon recording of said first, preferred mortgage, delivered two certified copies thereof to the mortgagor who placed and used due diligence to retain one copy on board the said vessel to be exhibited by the master to any person having business with the vessel which might give rise to a maritime lien upon the vessel, or to the sale, conveyance of mortgage thereof; and these mortgagees

allege upon information and belief that at all times since then the master of said vessel upon the request of any such person has exhibited to him the documents of said vessel and the copy of said first, preferred mortgage placed on board thereof. That upon the date of the execution of said mortgage, namely April 28, 1954, the mortgagor Tobin acknowledged receipt of two certified copies of the said mortgage; and on said date and upon the same instrument, Tobin as master of said vessel acknowledged receipt of one certified copy of said mortgage for placement on board the vessel. Further, upon said date, the said Tobin executed a certain prior and subsequent liens affidavit in favor of mortgagees Putnam and Overman wherein he certified there were no prior liens or obligations to his knowledge, further, there would not be future liens incurred without the consent of the mortgagees, with certain exceptions.

VII.

That Tobin, by reason of his violations of the terms and provisions of said mortgage, has forfeited all right, title, and interest in and to the Oil Screw "Silver Spray" and Putnam and Overman are entitled to a foreclosure of said mortgage. There is now due and owing upon said promissory note a principal balance of \$30,000.00 together with interest thereon at the rate of 5% per annum from April 28, 1954. Said promissory note provided that in the event suit is instituted to collect the amount due and owing the maker Tobin shall pay such additional sums as the Court may adjudge reasonable

as attorney's fees, and the sum of \$3000.00 is reasonable to be awarded to Putnam and Overman for and as proctor's fees herein. That said sums, together with all costs of suit, Marshal's charges, and costs of sale are within the lien of said first, preferred mortgage and chargeable to the proceeds of the Oil Screw "Silver Spray" upon due and regular foreclosure proceedings.

VIII.

The original libel filed herein together with the intervening libels were instituted for fishing shares for the 1954 season if the fishing venture had been fulfilled, and the libellant and intervening libellants claim, or may claim, to have a lien for shares against the vessel. Putnam and Overman allege that none of said libellants have a lien against the vessel, and if they claim to have liens they are junior, inferior and subordinate to the first, preferred mortgage lien against the Oil Screw "Silver Spray".

That all and singular the premises are within the admiralty jurisdiction of this Honorable Court.

Wherefore, intervening libellants Putnam and Overman Pray:

1. That process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said Oil Screw "Silver Spray", her mast, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel, furniture, and all other necessities thereunto appertaining and belonging;

that all persons claiming any interest in the said vessel may be cited to appear and answer the matters aforesaid, and that the vessel and appurtenances described may be condemned and sold to pay the demands and claims aforesaid, namely, the sum of \$30,000.00 together with interest at the rate of 5% per annum from April 28, 1954 until paid; and in addition thereto, the sum of \$3000.00 as a reasonable proctor's fee, together with costs of suit, costs of foreclosure, Marshal's charges and to pay any and all other amounts required to be paid by the mortgagor to the mortgagee under the said first, preferred mortgage for which evidence may be offered and proof be made.

2. That the said first, preferred mortgage dated April 28, 1954, be declared to be a valid and subsisting first and prior lien upon the Oil Screw "Silver Spray" and appurtenances, prior and superior to the interests, liens or claims of any and all persons, firms or corporations whatsoever, and particularly prior and superior to the claims of the libellant and other intervening libellants herein and each of them.

3. That in the default of the payment of all sums found due and payable to your intervening libellant under the said promissory note and first, preferred mortgage within the time to be limited by a decree of this Honorable Court, it may be decreed that any and all persons, firms and corporations claiming any interest in the said respondent vessel are forever barred and foreclosed of and from all right or equity of redemption, or claim of,

in or to the said mortgaged respondent vessel and her appurtenances and every part thereof.

4. That in due form and by due process a citation be issued to the respondent Robert J. Tobin to appear and answer the allegations of this libel, or upon his failure to do so, a default in due course be entered against said respondent, and libellant further prays that a judgment be entered against said respondent for such deficiency as may result and be represented by the difference between libellants' total recovery as herein prayed for and the amount recovered upon due and regular sale of said respondent vessel by the United States Marshal.

5. That these intervening libellants Putnam and Overman may have such further relief as in law and justice they may be entitled to receive.

/s/ STEPHEN V. CAREY,

Proctor for Intervening Libellants Fred I. Putnam
and James A. Overman.

Acknowledgment of Service attached.

Duly Verified.

[Endorsed]: Filed August 25, 1954.

[Title of District Court and Cause.]

MONITION AND ATTACHMENT

The President of the United States of America
To the Marshal of the United States for the West-
ern District of Washington, Greeting:

Whereas, an intervening Libel hath been filed in

the United States District Court for the Western District of Washington, on the 25th day of August, in the year of our Lord one thousand nine hundred and fifty-four, by Fred I. Putnam and James A. Overman for the reasons and causes in the said Intervening Libel mentioned, and praying the usual process and monition of the said Court in that behalf be made, and that all persons interested in the said Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, or vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment or vessel, her tackle, etc., may for the causes in the said Intervening Libel mentioned, be condemned and sold to pay the demands of the Libellant.

You Are Therefore Hereby Commanded to attach the said Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, or vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held at Seattle, in the Western District of Washington, on the 14th day September, A.D. 1954, at 10 o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of

Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof together with this writ.

Witness, the Hon. John C. Bowen, Judge of said Court, at the City of Seattle, in the Western District of Washington, this 25th day of August, in the year of our Lord one thousand nine hundred and fifty-four and of our independence the one hundred and seventy-ninth.

MILLARD P. THOMAS, Clerk

/s/ By MARION MILLER, Deputy Clerk

Marshal's Return

I hereby certify and return that in obedience to the attached Monition and Attachment, I attached the Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, at Seattle, Washington, on the 26th day of August, 1954, and have her in my custody. I have given due notice to all persons claiming the same, or knowing or having anything to say why same should not be condemned and sold pursuant to the prayer of Intervening Libel, that they be and appear before this Court to be held at Seattle in the Western District of Washington, on the 14th day of September, 1954, by causing a Notice to be published in The Daily Journal of Commerce, Seattle, Washington, on the 27th day of August, 1954, and by posting like Notice on the seized Oil Screw Vessel Silver Spray, at

Lake Union Drydock, 1515 Fairview Avenue North, Seattle, Washington.

A true copy of the Monition and Attachment, with copy of the Intervening Libel in Rem and In Personam, was served on Frank H. Oliver, Superintendent, Lake Union Drydock, 1515 Fairview Avenue North, Seattle, Washington, in whose custody I found the Oil Screw Vessel Silver Spray.

W. B. PARSONS, U. S. Marshal
/s/ By PYRL J. FORCIER, Deputy

Marshal's fee, \$2.00; Expense, 40c; Advertising, \$14.80; Total, \$17.20.

Affidavit of Publication

State of Washington,
County of King—ss.

L. J. Brown, being first duly sworn, on oath deposes and says that he is the business manager and one of the publishers of The Daily Journal of Commerce, a daily newspaper. That said newspaper is a legal newspaper and it is now and has been for more than six months prior to the date of the publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now and during all of said time was printed in an office maintained at the aforesaid place of publication of said newspaper. That the said Daily Journal of Commerce was on the 12th day of June, 1941, ap-

proved as a legal newspaper by the Superior Court of said King County.

That the annexed is a true copy of U. S. Marshal Notice as it was published in the regular issue (and not in supplement form) of said newspaper on the 27th day of August, 1954, and that said newspaper was regularly distributed to its subscribers during all of said period.

/s/ L. J. BROWN

Subscribed and sworn to before me this 27th day of August, 1954.

[Seal] /s/ E. CAMPBELL,
Notary Public in and for the State of Washington,
residing at Seattle.

U. S. Marshal's Notices

Notice. Whereas, on the 25th day of August, 1954, Fred I. Putnam and James A. Overman, Intervening Libelants, by Stephen V. Carey of Seattle, Washington, Proctors for Libelant, filed an intervening libel in the District Court of the United States for the Western District of Washington, against the Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, in a cause of action civil and maritime, numbered 16039, for Preferred Mortgage in the sum of \$30,000.00 with interest. And whereas, by virtue of process in due form of law, to me directed, I have attached and retain the same in my custody. Notice is hereby given to all persons claiming the same, or knowing or having anything to say why the same

should not be condemned and sold pursuant to the prayer of the said Intervening Libel, that they be and appear before the said court, to be held at Seattle, Washington, in the Western District of Washington, on the 14th day of September, A.D. 1954, at ten o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. W. B. Parsons, U. S. Marshal. (4172-M)

[Endorsed] Filed August 30, 1954.

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSES
OF RESPONDENT TOBIN TO LIBEL
AND INTERVENING LIBELS OF LOWER,
BUNKER, HERNING, PEECHER AND
BARQUIST

To the Honorable Judges of the Above Entitled
Court:

Comes now the respondent Robert J. Tobin and in answer to the libel and intervening libels as above designated denies and alleges as follows:

I.

In answer to the libel and said intervening libels collectively, respondent admits that each of the said libelants were entitled to a 1/10th share of the catch; and further admits the vessel sailed on a shake-down cruise to Alaska; and further admits

the vessel returned to Seattle and the libelants left the vessel.

Respondent denies each and every other allegation contained in the libel and intervening libels and demands strict proof thereof.

As and for a First Affirmative Defense respondent alleges:

Each of the libelants appearing in the above caption signed a fishing share agreement on the Silver Spray in form as attached hereto as Exhibit A, the terms of which are incorporated herein as though set forth in full. Each of the libelants became dissatisfied with the proposed venture but violated said contract by refusing to give respondent 30 days oral notice of intention to withdraw from the venture. The contract further provides that in the event libelants or any of them leaves the vessel or is dismissed the respondent shall have ninety days within which to sell shares and make full refunds of the amounts invested by libelants. The libelants further violated the contract by causing a seizure of the vessel by the United States Marshal thus preventing respondent to sell the working shares and make full refunds.

As and for a Second Affirmative Defense respondent alleges:

None of the libelants has had fishing or sailing experience and each was fully informed and well knew the risks attendant upon tuna fishing and that

under such circumstances wages could not be and were not contracted for or agreed upon either for the shake-down cruise to Alaska or thereafter, and each libelant was informed and knew that earnings, if any, were to be charged against fishing profits, if any, at the end of the voyage.

That not being seamen suing for, or entitled to, wages, none of the libelants are entitled to any relief under 28 USCA 1916 without prepaying costs and posting security.

As and for a Third Affirmative Defense respondent alleges:

At all times up to the seizure of the vessel by the United States Marshal, the respondent was willing to continue with the proposed fishing operation, but upon return to the Port of Seattle the libelants entirely upon their own initiative and volition quit the vessel. Libelants did not and do not have maritime liens for speculative and prospective profits on fish that were not caught, and by causing the vessel to be wrongfully seized, the libelants have caused respondent to suffer damages by substantial monetary losses at the rate of \$100.00 per day from seizure, and their wrongful acts have prevented respondent from operating the vessel and thus have induced a foreclosure of a preferred mortgage with a consequent loss of respondent's ownership.

In the event the Court finds respondent obligated to libelants in personam it is fitting and proper to ascertain and fix respondent's losses and damages

and to set them off against any amounts due libelants.

Wherefore, having fully answered the libel, respondent prays that it be dismissed and that said vessel be released from monition and attachment and that he recover his costs herein incurred; further, in the event libelants are entitled to a personam judgment against respondent that he be adjudged to have a set off against libelants for all damages resulting for breach of contract and wrongful seizure of the vessel; further for such other relief as may be meet and equitable in the premises.

ANDERSON & COLLINS,
/s/ By LEONARD COLLINS,
Proctors for Respondent

Duly Verified.

Acknowledgment of Service attached.

EXHIBIT "A"

WORKING SHARE AND CONTRACT ON
TUNA CLIPPER SILVER SPRAY
OWNED AND OPERATED BY R. J.
TOBIN

This Agreement made and entered into this....
day of....., 1954, by and between R. J.
Tobin, hereinafter termed party of the first part,
and.....hereinafter termed party of the second
part, provides that

1. In consideration of the sum of \$. paid by the second party, the first party agrees to sell one working share in the fishing boat. owned by the first party.

2. The first party shall furnish all fuel, food, gear, and second party shall work under orders of first party or whomever the first party shall designate as Captain.

3. All boat movement and fishing operation shall be controlled by first party.

4. The location of the fishing operation shall be in southern waters or wherever designated by party of the first part.

5. The boat. shall carry. working shares to be divided as follows: one-half to the boat owner or party of the first part, and one-half to the crew who are shareholders.

6. In the event the party of the second part becomes dissatisfied with the working share he will give 30 days oral notice to party of the first part, which will enable first party to replace second party without hindering the operation of the boat.

7. In the event the second party desires to sell his share in the boat, the purchaser must be approved by the first party.

8. If the second party leaves or is dismissed from service, the first party will sell the working share for second party within 90 days of leaving the boat and give him full refund.

9. If the second party leaves the boat of his own free will and volition, he shall pay his own expenses to the point of departure, viz., Seattle.

10. If the second party proves unsatisfactory to the first party, the first party may terminate this agreement immediately, and the above conditions with regard to selling working shares shall then apply, provided, however, that if the first party terminates the agreement the first party shall pay the fare of the second party back to the point of departure, viz., Seattle.

11. In the event party of the first part shall decide to go out of business, the boat and equipment will be sold and shareholders paid off.

12. The party of the second part agrees to settle any difference with the first party and to arbitrarily do nothing whatsoever to hinder the operation of the boat and crew.

13. It is further understood that the first party is not responsible for life or limb of second party, and the second party thoroughly understands the hazards and risks of the venture.

14. This agreement by mutual consent of both parties may be made to apply to any other boat operated by first party insofar as he sees fit to adaptability of the second party.

15. In Witness Whereof the parties have caused

this agreement to be executed the day and year first above written at.....

.....,

First Party

.....,

Second Party

[Endorsed]: Filed September 2, 1954.

—

[Title of District Court and Cause.]

REPLY OF LIBELANT HARRY C. LOWER

To the Honorable the Judges of the Above Entitled Court:

The reply of the libelant Harry C. Lower to the answer of the respondent Robert J. Tobin on file in this case alleges:

I.

Admits that libelant signed a purported working share and contract prepared by the said respondent, at Spokane, Washington, on April 17, 1954. Except as thus admitted, libelant denies the allegations of paragraph II.

II.

At the time referred to above, libelant had never served on a commercial fishing vessel, and had no experience with or knowledge about commercial fishing. On the same date, respondent represented to libelant that he was the owner of an 80 foot tuna fishing vessel called the Silver Spray; that said

vessel was equipped to fish for tuna, and that a crew was already employed on shares, except for one vacancy; that respondent had had previous experience in commercial fishing as owner and operator of two vessels; that respondent had entered into a contract with Van Camp Sea Food Co., Inc., to fish for tuna out of San Diego, California, for the 1954 season, using the said vessel Silver Spray; that respondent then planned and was prepared to take the vessel south to San Diego from Puget Sound by May 15, 1954, for the 1954 tuna fishing season. Said representations were made to libelant for the purpose of inducing him to sign the aforesaid agreement, and libelant agreed to work aboard the said vessel for a tenth of the catch by virtue thereof.

III.

The aforesaid representations by respondent were false, and were made by him with intent to deceive libelant so that the said writing prepared by respondent and then executed by libelant as aforesaid, and as alleged by respondent in answer to the libel, is null and void, and of no effect.

IV.

Further replying to said answer, libelant admits that he had had no fishing experience, and that no wages in specific sum were agreed to, but otherwise libelant has no knowledge or information sufficient to form a belief as to the truth of the matters alleged in paragraph III, and therefore denies the same.

V.

Libelant denies the allegations of paragraph IV of said answer.

Wherefore, libelant prays that the affirmative defenses alleged by respondent be denied, and that he have a decree as prayed for in his libel.

/s/ BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,

/s/ M. BAYARD CRUTCHER,

Proctors for Libelant

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 8, 1954.

[Title of District Court and Cause.]

REPLY OF INTERVENING LIBELANT
NORMAN BUNKER

To the Honorable The Judges of the Above Entitled Court:

The reply of intervening libelant Norman Bunker to the affirmative defenses set forth in the Answer of respondent Tobin on file in this cause, alleges:

I.

Admits that intervening libelant signed a purported working share and contract prepared by said respondent at Seattle, Washington, on June 2, 1954, and denies all remaining allegations of respondent's First Affirmative Defense.

II.

That intervening libelant had never served on a commercial fishing vessel, but held an unlimited master's license and had considerable deep water experience as a merchant mariner but no experience with, or knowledge about commercial fishing. That on June 2, 1954 and prior thereto, respondent represented to intervening libelant that he was the sole owner of a tuna fishing vessel called, "Silver Spray;" that said vessel was equipped to fish for tuna and that respondent had ample funds to successfully provide and maintain the venture and that a crew was already employed on shares, including an experienced bait man and an experienced refrigerator man, two positions most important to the venture; that there was one vacancy on the crew, which vacancy was represented to be that of navigator; that intervening libelant was qualified to navigate said vessel. That respondent had entered into a contract with Van Camp Sea Food Co., Inc., to fish for tuna south of San Diego, California for the 1954 season using said vessel "Silver Spray." That said fishing company would operate a helicopter to assist in locating tuna fish; that respondent then planned and was prepared to take the vessel south to San Diego, leaving from Puget Sound on June 11 or 12, 1954, for the 1954 tuna fishing season. That said representations were made to intervening libelant for the purpose of inducing him to sign the aforesaid agreement, and intervening libelant agreed to work aboard said vessel for a tenth of the catch by virtue thereof.

III.

That the aforesaid representations by respondent were false, and were made by him with intent to deceive intervening libelant, so that said writing prepared by respondent and executed by intervening libelant as aforesaid and alleged by respondent in his Answer herein, is null and void and of no effect.

IV.

That intervening libelant admits that he had no fishing experience, and that no wage in specific sum was agreed to, but otherwise intervening libelant specifically denies all other matters alleged in respondent's Second Affirmative Defense.

V.

That intervening libelant denies each and every allegation contained in respondent's Third Affirmative Defense and the whole thereof.

Wherefore, intervening libelant prays that the affirmative defenses as alleged by respondent be denied, and that he have a decree as prayed for in his intervening libel herein.

/s/ ROBERT C. WELLS,

Proctor for Intervening Libelant
Bunker.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 10, 1954.

[Title of District Court and Cause.]

REPLY OF INTERVENING LIBELANT
GEORGE S. HERNING

To the Honorable the Judges of the Above Entitled
Court:

The reply of the intervening libelant George S. Herning to the answer of the respondent Robert J. Tobin on file in this cause alleges:

I.

The intervening libelant George S. Herning admits that he signed a purported working share contract prepared by said respondent on the 27th day of April, 1954, but denies each and every other allegation contained in paragraph 1 of the answer.

II.

The intervening libelant George S. Herning denies each and every allegation contained in the first affirmative defense of the respondent Robert J. Tobin and particularly denies that he has violated the alleged contract in any manner whatsoever.

III.

The intervening libelant further denies the second affirmative defense of the respondent Robert J. Tobin and particularly denies that he had had no fishing or sailing experience whatsoever but on the contrary alleges that he had fished previously for salmon in Alaskan waters and that he had experi-

ence as an engineer aboard fishing vessels and had so served. The intervening libelant further alleges that after he went aboard the SS Silver Spray he was assigned to engineering duties and did so perform aboard the SS Silver Spray as alleged in the intervening libel on file herein.

IV.

The intervening libelant George S. Herning further denies each and every allegation set forth in the third affirmative defense of the respondent Robert J. Tobin and particularly denies that he has caused the respondent to suffer damages at the rate of \$100.00 per day or any other sum whatsoever.

V.

The intervening libelant denies each and every other allegation contained in the answer and affirmative defenses of the respondent Tobin which he has not specifically denied hereinabove.

Wherefore, intervening libelant prays that the affirmative defenses alleged by the respondent be denied, that he have a decree as prayed for in his intervening libel.

/s/ ROBERT B. ALLISON,
Proctor for Intervening Libelant
George S. Herning.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 13, 1954.

[Title of District Court and Cause.]

REPLY OF INTERVENING LIBELANTS
EDGAR L. PEECHER AND WILLIAM E.
BARQUIST.

To the Honorable Judges of the Above Entitled
Court:

The reply of the intervening libelant, Edgar L. Peecher to the answer and affirmative defense of the respondent, Robert J. Tobin, on file in this case, alleges:

I.

Edgar L. Peecher admits that he signed a purporting working share and contract prepared by the said respondent at Seattle, Washington on May 4, 1954. Except as thus admitted, this libelant denies the allegations of respondent's first affirmative defense.

II.

At the time referred to above, Edgar L. Peecher had never served on a commercial fishing vessel and had no experience with or knowledge about commercial fishing and so informed the respondent, Robert J. Tobin. The respondent, Robert J. Tobin, represented to this intervening libelant that he was the owner of an 80 foot tuna clipper called the "Silver Spray"; that the said vessel was to be equipped or was equipped for clipper tuna fishing, and that in the crew which was already employed there were two experienced tuna fishermen plus the experience of the respondent, Tobin, of three years' fishing experience in Alaska; that the vessel had

been chartered with Van Camp Sea Food Co., Inc. to fish for tuna out of San Diego, California for the 1954 season, to arrive in San Diego, California not later than June 1, 1954. That as a result of the said representations, this intervening libelant was induced to quit his job at the Pacific Car & Foundry Co., Renton, Washington at the salary of \$92.00 a week, and to advance to the respondent, Robert J. Tobin, the sum of \$2,500.00 for a working share on the said "Silver Spray" in return for a one-tenth of the catch of the vessel.

III.

That the aforesaid representations by the respondent were false and were made by him with the intent to deceive intervening libelant, and said writing prepared by the respondent and then executed by this intervening libelant, as aforesaid, and as alleged by respondent in the Answer to the libel, is null and void and of no effect.

IV.

Further replying to said answer and affirmative defense, this intervening libelant admits that he had no fishing experience and that no wages in specific sum were agreed to, and all other matters contained in said respondent's second affirmative defense are specifically denied.

V.

This intervening libelant denies each and every

allegation, matter and thing contained in respondent's third affirmative defense.

The reply of intervening libelant, William E. Barquist, to the affirmative defenses set forth in the answer of the respondent, Tobin, on file in this cause, alleges:

I.

Admits that said intervening libelant signed a purported working share and contract prepared by the respondent at Seattle, Washington on May 4, 1954 and denies all other allegations in said respondent's first affirmative defense.

II.

This intervening libelant had no previous experience on a commercial fishing vessel nor knowledge about such vessel. Respondent represented to this intervening libelant that he was the owner of an 80 foot tuna clipper fishing vessel called the "Silver Spray" and that said vessel was equipped for tuna clipper fishing for tuna, or would be so equipped on its arrival in California, and that the said vessel was to leave for San Diego, California on May 15, 1954 to arrive not later than June 1, 1954 to fulfill contract with Van Camp Sea Food Co., Inc. to fish for tuna out of San Diego, California for the 1954 season.

III.

That the aforesaid representations by the respondent were false and were made with the intent

to deceive this intervening libelant so that said writing prepared by the respondent and executed by this intervening libelant, as alleged by the respondent in answer to the libel, is null and void and of no effect.

IV.

Further replying to said answer and affirmative defense, this intervening libelant admits that he had no fishing experience and that no wages in specific sum were agreed to, but that otherwise this intervening libelant has no knowledge or information sufficient to form a belief as to the truth of the matters alleged in paragraph III or the second affirmative defense, and therefore denies the same.

V.

This intervening libelant denies the allegations of the third affirmative defense.

Wherefore, the intervening libelants herein pray that the affirmative defenses alleged by the respondent be denied and that they have a decree as prayed for by their libel.

/s/ LEWIS S. ARMSTRONG,
Proctor for Intervening Libelants Edgar L. Peecher and William E. Barquist.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 14, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause having come on regularly for trial on the 14th day of September, 1954, and the said trial having been continued from day to day and concluded on the 17th day of September, 1954, all of the parties being represented by their proctors of record, and the Court having duly considered the testimony of the witnesses and the exhibits admitted in evidence, and having duly considered the briefs and arguments of counsel, and being fully advised in the premises, does now make the following

Findings of Fact.

I.

That on or about April 28, 1954, the respondent Robert F. Tobin purchased the respondent oil screw vessel Silver Spray, Official Number 250,538, her engines, tackle, apparel, furniture and equipment. At all times material since that date, said respondent has been and still is the owner and operator of said vessel.

II.

That the said respondent oil screw vessel Silver Spray was duly and regularly attached by the United States Marshal pursuant to the process of this Court, in this cause, on June 10, 1954, in waters within the Port of Seattle, Washington, within this District and within the jurisdiction of this Court.

That the said respondent, Robert F. Tobin, duly appeared in this cause and made claim to said vessel, as it owner, on July 26, 1954.

III.

That on or about April 17, 1954, the said respondent, Robert F. Tobin, entered into a contract of employment with the libelant, Harry C. Lower, the said libelant agreeing to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

IV.

That on or about April 21, 1954, the said Harry C. Lower commenced working on board said vessel at the Port of Seattle, Washington, and thereafter continued to serve on board said vessel as a member of its crew until discharged as hereinafter related.

V.

That on or about April 22, the said respondent, Robert F. Tobin, entered into a contract of employment with the intervening libelant George S. Herning, the said intervening libelant agreeing to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

VI.

That on or about April 27, 1954, the said George

S. Herning commenced working on board said vessel at the Port of Seattle, and thereafter continued to serve on board said vessel as assistant engineer and as a member of its crew until discharged as hereinafter related.

VII.

That on or about April 30, 1954, the said respondent Robert F. Tobin entered into a contract of employment with the intervening libelant Edgar L. Peecher, the said intervening libelant agreeing to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

VIII.

That on or about May 1, 1954, the said Edgar L. Peecher commenced working on board said vessel at the Port of Seattle, and thereafter continued to serve on board said vessel as a member of its crew until relieved by the said respondent of his duties at the Port of Ketchikan, Alaska, on or about May 24, 1954. That the said Edgar L. Peecher thereafter reported for work aboard said vessel on or about June 4, 1954, and remained aboard said vessel as a member of its crew until discharged as hereinafter related.

IX.

That on or about May 11, 1954, the said respondent Robert F. Tobin entered into a contract of employment with the intervening libelant William E. Barquist, the said intervening libelant agreeing

to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

X.

That on or about the same date the said William E. Barquist commenced working on board said vessel at the Port of Seattle, and thereafter continued to serve on board said vessel as a member of its crew until discharged as hereinafter related.

XI.

That on or about June 2, 1954, the said respondent Robert F. Tobin entered into a contract of employment with the intervening libelant Norman L. Bunker, the said intervening libelant agreeing to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

XII.

That on June 3, 1954, the said Norman L. Bunker reported on board said vessel for work at the Port of Seattle, and performed duties thereon in preparation for the navigation of said vessel on its intended voyage. That the said intervening libelant was then advised by respondent's agent that he would be called when needed, and that the said Norman L. Bunker thereafter remained in the serv-

ice of said vessel as a member of its crew until discharged as hereinafter related.

XIII.

That on or about April 28, 1954, the intervening libelant John Kadlec commenced working on board the said vessel at the Port of Seattle as a member of its crew, for an agreed wage of \$100 per week. That the said intervening libelant thereafter continued to serve on board said vessel as a member of its crew until on or about June 3, 1954.

XIV.

That the said intervening libelant John Kadlec became and is entitled to wages of \$500.00 for the services aforesaid, no part of which sum has been paid to him except \$5.00.

XV.

That on June 7, 1954, and at all times subsequent thereto and following their respective employments, the aforesaid libelant and intervening libelants, excepting John Kadlec, were ready, able and willing to continue to perform their respective contracts of employment aboard the said vessel Silver Spray, as above described. That nevertheless, the respondent Robert F. Tobin on or before said date abandoned his contracts with said persons, and abandoned the tuna fishing voyage for the 1954 tuna fishing season, as above described, and thereby wrongfully discharged said libelant and intervening libelants.

XVI.

That the abandonment of the said contract of employment and of the said voyage by the respondent Robert F. Tobin, the owner and operator of said vessel, was through no fault of the said libelant or intervening libelants.

XVII.

That on June 7, 1954, the libelant Lower and the said intervening libelants Herning, Peecher, Barquist and Bunker became entitled to and then had valid causes of action against the said oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, and against the respondent Robert F. Tobin, for damages to the extent of the value of the share of each of said libelant crew members in and to the prospective tuna fish catch of the said vessel Silver Spray, as a tuna clipper equipped for fresh bait and refrigeration, for the 1954 season.

XVIII.

That the said causes of action above mentioned are the causes of action sued upon in this proceeding.

XIX.

That the said libelant and intervening libelant crew members may also have had causes of action against the respondent Robert F. Tobin at common law for fraud and deceit, or on some other cause of action at law. That they were nevertheless not required to sue the said respondent on any such theory, and did not do so in this proceeding.

XX.

That the value of each of said shares referred to in finding number XV was and is the sum of \$7,500.00, for which amount each of said libelant and intervening libelants Harry C. Lower, George S. Herning, Edgar L. Peecher, William E. Barquist and Norman L. Bunker has a maritime lien against the said oil screw vessel *Silver Spray*, her engines, tackle, apparel, furniture and equipment, and a right of action in personam against the respondent, Robert F. Tobin.

XXI.

That the nature and rank of the liens of the said libelant and intervening libelant crew members were and are for seaman's wages, and that the same are superior and prior to the maritime lien of the preferred ship mortgage lien hereinafter referred to.

XXII.

That from said shares above mentioned should be deducted the respective earnings of the said libelant and intervening libelants to the date of trial, and their prospective earnings to the end of the tuna fishing season, to-wit, on or about October 15, 1954. That there should be deducted from the share of the libelant, Harry C. Lower, the sum of \$875.00.

That there should be deducted from the share of the intervening libelant George S. Herning the sum of \$450.00.

That there should be deducted from the share of

the intervening libelant Edgar L. Peecher the sum of \$100.00.

That there should be deducted from the share of the intervening libelant William E. Barquist the sum of \$998.00.

That there should be deducted from the share of the intervening libelant Norman L. Bunker the sum of \$180.00.

XXIII.

That on April 28, 1954, the said respondent, Robert F. Tobin, executed and delivered to Fred I. Putnam and James A. Overman, additional intervening libelants, his promissory note in the sum of \$30,000.00, which sum he promised to pay in two installments each year in the amounts of \$2,500.00 each, including interest at the rate of five (5%) per cent per annum. Said promissory note provided that the first of said installments should be paid on September 1, 1954, and that if the same were not paid the whole sum of principal and interest should become immediately due and collectible at the option of the holder thereof. Said promissory note further provided that in case suit or action be instituted to collect the same, or any portion thereof, the respondent should pay such additional sum as the Court might adjudge reasonable as attorney's fees in said suit or action.

XXIV.

That to secure the payment of the principal and interest of said promissory note above referred to, the said respondent executed and delivered to the

said additional intervening libelants, as mortgagees, a preferred ship mortgage dated April 28, 1954, by the terms of which the said respondent mortgaged to the said additional intervening libelants the whole of the said oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, said mortgage providing that if respondent should fail to perform the covenants and promises in said promissory note and in said mortgage, then the said mortgage should be in default.

XXV.

That the said preferred ship mortgage was thereafter duly filed for record in the office of the Collector of Customs at the Port of Seattle, Washington, and was duly recorded by him, on April 28, 1954, in accordance with the provisions of Section 30, Subsection "C" of the Ship Mortgage Act of June 5, 1920. That the said mortgage was endorsed upon the document of the said vessel in accordance with the provisions of said Act, and that all of the acts required to be done by said Act in order to give to the said mortgage status of a preferred ship mortgage were duly done or caused to be done, either by mortgagees or by the said Collector of Customs.

XXVI.

That the said respondent has failed to pay the first installment due under the terms of the aforesaid promissory note, and is in default, and that there is now due and owing to the said additional intervening libelants, Fred I. Putnam and James

A. Overman, the principal sum of \$30,000.00, together with interest thereon in the sum of \$750.00, and the said additional intervening libelant's costs and disbursements herein to be taxed.

XXVII.

That in addition thereto the said additional intervening libelants are entitled to recover a reasonable attorney's fee, as provided for by the terms of the aforesaid promissory note, which the Court finds to be and fixes in the amount of \$2,500.00.

XXVIII.

That the said additional intervening libelants have a preferred ship mortgage lien against the respondent vessel for the sums aforesaid, and that said lien is secondary to the liens of the libelant and intervening libelant crew members.

XXIX.

That the rights of action and the rights of libelant and the intervening libelant crew members to have the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, attached by the process of this Court arose not less than three days before said vessel was attached at the instance of the libelant. That the claim of the respondent Robert F. Tobin against libelant and against the said intervening libelants for damages in the nature of demurrage or detention, for wrongful attachment of said vessel, is not valid and should be denied.

Done in Open Court this 28th day of October, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Based upon the foregoing findings of fact the Court now makes the following

Conclusions of Law

I.

That this proceeding is within the admiralty and maritime jurisdiction of the United States and within the jurisdiction of this Court sitting in admiralty.

II.

That the libelant, Harry C. Lower, is entitled to a decree herein against the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, and against the respondent Robert F. Tobin, in the sum of \$6,625.00, together with his costs and disbursements herein to be taxed.

III.

That the intervening libelant George S. Herning is entitled to a decree herein against the said respondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$7,050.00, together with his costs and disbursements herein to be taxed.

IV.

That the intervening libelant Edgar L. Peecher is entitled to a decree herein against the said re-

spondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$7,400.00, together with his costs and disbursements herein to be taxed.

V.

That the intervening libelant William E. Barquist is entitled to a decree herein against the said respondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$6,502.00 together with his costs and disbursements herein to be taxed.

VI.

That the intervening libelant Norman L. Bunker is entitled to a decree herein against the said respondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$7,320.00, together with his costs and disbursements herein to be taxed.

VII.

That the intervening libelant John Kadlec is entitled to a decree herein against the said respondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$495.00, together with his costs and disbursements herein to be taxed.

VIII.

That the aforesaid libelant and intervening libelant crew members are entitled to have the said vessel, her engines, tackle, apparel, furniture and equipment, condemned and sold, and the proceeds of sale applied first to the payment of the said liens.

IX.

That the aforesaid maritime liens of the libelant Harry C. Lower and the intervening libelants George S. Herning, Edgar L. Peecher, William E. Barquist, Norman L. Bunker and John Kadlec against said vessel are superior in rank and prior to the maritime lien of the preferred ship mortgage of the additional intervening libelants, Fred I. Putnam and James A. Overman.

X.

That the additional intervening libelants, Fred I. Putnam and James A. Overman, mortgagees, are entitled to a decree herein against the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, in the sum of \$30,725.00, together with a reasonable attorney's fee in the sum of \$2,500.00, and their costs and disbursements herein to be taxed.

XI.

That the said lien of the additional intervening libelants, Fred I. Putnam and James A. Overman, against said vessel, is superior in rank and prior in time to any and all maritime liens against the said vessel saving those foreclosed by the above mentioned libelant Harry C. Lower and intervening libelants George S. Herning, Edgar L. Peecher, William E. Barquist, Norman L. Bunker and John Kadlec.

XII.

That the said additional intervening libelant

mortgagees are entitled to have the said vessel condemned and sold, and the proceeds of sale applied to the amount of their said claim, together with their attorney's fee and costs allowed herein, subject, however, to the full payment of the prior maritime liens in the amounts herein found due of the libelant and intervening libelant crew members, together with their costs and disbursements.

XIII.

That any deficiency remaining unpaid after applying the proceeds of sale of said respondent vessel to payment of the aforesaid claims in the order of rank above provided, the aforesaid libelant and intervening libelants and additional intervening libelants are entitled to recover of the respondent Robert F. Tobin, together with interest thereon from the date of the decree.

Done in Open Court this 28th day of October, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Approved as to form and presented by:

/s/ M. BAYARD CRUTCHER,

Of Bogle, Bogle & Gates, Proctors for
Libelant.

/s/ LEWIS S. ARMSTRONG,

Proctor for Intervening Libelants Wil-
liam E. Barquist and Edgar L.
Peecher.

/s/ ROBERT B. ALLISON,
Proctor for Intervening Libelant
George S. Herning.

/s/ ROBERT C. WELLS,
Proctor for Intervening Libelant
Norman L. Bunker.

Acknowledgment of Service attached.

[Endorsed]: Lodged October 26, 1954.

[Endorsed]: Filed October 28, 1954.

In the United States District Court for the West-
ern District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
vs.

THE Oil Screw Vessel SILVER SPRAY, etc.,
et al., Respondents,
JOHN KADLEC, et al., Intervening Libelants,
FRED I. PUTNAM and JAMES A. OVERMAN,
Additional Intervening Libelants.

DECREE

The above entitled cause having regularly come on for trial in the above entitled Court, before the undersigned Judge thereof, on September 14, 1954, said trial having thereafter been regularly continued from day to day and concluded on September 17, 1954, the libelant, Harry C. Lower, and the

intervening libelant John Kadlec being present in Court and represented by M. Bayard Crutcher, their proctor, and the intervening libelant George S. Herning being present in Court and represented by his proctor, Robert B. Allison, and the intervening libelants Edgar L. Peecher and William E. Barquist being present in Court and represented by their proctor, Lewis S. Armstrong, and the intervening libelant Norman L. Bunker being present in Court and represented by his proctor, Robert C. Wells, and the respondent and claimant to the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture, and equipment, Robert J. Tobin, being present in Court and represented by Leonard Collins, his proctor, and the additional intervening libelants Fred I. Putnam and James A. Overman being present in Court and represented by their proctor, Stephen V. Carey, and this Court having duly considered the evidence and exhibits submitted by the respective parties, and the briefs and arguments of counsel, and being fully advised in the premises, and having orally announced its decision herein and having entered its findings of fact and conclusions of law herein.

Now, Therefore, in accordance therewith, it is

Ordered, Adjudged and Decreed that the libelant, Harry C. Lower, have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$6,625.00, together with his costs herein taxed in the sum of \$35.00, with interest on said total sum until paid; that the intervening libelant George S. Herning have and recover of the respond-

ent vessel and of the respondent Robert J. Tobin the sum of \$7,050.00, together with his costs herein taxed in the sum of \$30.40, with interest on said total sum until paid; that the intervening libelant Edgar L. Peecher have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$7,400.00, together with his costs herein taxed in the sum of \$20.00, with interest on the said total sum until paid; that the intervening libelant William E. Barquist have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$6,502.00, together with his costs herein taxed in the sum of \$0.00, with interest on the said total sum until paid; that the intervening libelant Norman L. Bunker have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$7,320.00, together with his costs herein taxed in the sum of \$20.00, with interest on the said total sum until paid; that the intervening libelant John Kadlec have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$495.00 together with his costs herein taxed in the sum of \$0.00, with interest on the said total sum until paid; and that the liens of the aforesaid libelant and intervening libelants are equal and superior in rank to that of the preferred ship mortgage foreclosed herein; and it is

Further Ordered Adjudged and Decreed that the preferred ship mortgage upon the respondent vessel be and the same is hereby foreclosed, and that the mortgagees, the additional intervening libelants Fred I. Putnam and James A. Overman, have and

recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$33,225.00, together with their costs herein taxed in the sum of \$28.20, with interest on said total sum (excepting the amount of \$725.00) until paid; and that the lien of the aforesaid additional intervening libelants Putnam and Overman is superior and prior to any other maritime liens whatsoever against said vessel, save those for costs and for the awards to the libellant and intervening libelants above provided for; and said vessel "Silver Spray", her engines, tackle, apparel, furniture and equipment are hereby condemned and ordered sold by the Marshal to the highest and best bidder for cash and that the proceeds of such sale be applied to the payment of the foregoing awards to said libelants and intervening libelants and said Putnam and Overman and to said costs and accruing costs; and it is

Further Ordered, Adjudged and Decreed that any other persons having or claiming any interest whatsoever in said vessel be and the same are hereby foreclosed and forever barred from asserting the same; and it is

Further Ordered, Adjudged and Decreed that the Clerk of this Court issue a writ of venditioni exponas to Marshal of this District, for the sale of said vessel on board thereof, returnable on the 15th day of November, 1954, the Marshal giving six (6) days notice of sale pursuant to law, and it is

Further Ordered, Adjudged and Decreed that out of the proceeds of the sale of the said oil screw vessel Silver Spray, when paid into the registry

of the Court, the Clerk of this Court take such lawful fees and costs, including moorage and insurance premiums in lieu of ship's keepers and such other costs as may be due to him and to the United States Marshal, and then pay to the libelant Harry C. Lower, or his proctor, and to the intervening libelants George S. Herning, Edgar L. Peecher, William E. Barquist, Norman L. Bunker and John Kadlec, or their proctors, the respective amounts herein adjudged due to each of them, prorata, and it is further

Ordered, Adjudged and Decreed that if any part of the proceeds of sale of said vessel then remains in the registry of the Court, that the same be paid by the Clerk to the additional intervening libelants Fred I. Putnam and James A. Overman, or their proctor, in the amount herein adjudged due to them; and it is

Further Ordered, Adjudged and Decreed that if there be any residue in the registry of the Court after the payment of the proceeds as above directed, the same be paid to the respondent Robert J. Tobin, or his proctor, and it is

Further Ordered, Adjudged and Decreed that for any deficiency of the proceeds of the sale of said vessel to satisfy the amounts adjudged due to the libelant and respective intervening libelants and additional intervening libelants as aforesaid, the said libelant and respective intervening libelants and additional intervening libelants shall have execution against the respondent and his stipulators for costs,

their goods, chattels and lands, forthwith to satisfy this decree.

Done in Open Court this 28th day of October, 1954.

/s/ JOHN C. BOWEN,
United States District Judge

Approved and presented by:

/s/ BAYARD CRUTCHER,
Of Proctors for Libelant Harry C. Lower
and Intervening Libelant John Kadlee

/s/ LEWIS S. ARMSTRONG,
Proctor for Intervening Libelants Edgar
L. Peecher and William E. Barquist.

/s/ ROBERT B. ALLISON,
Proctor for George S. Herning.

/s/ ROBERT C. WELLS,
Proctor for Intervening Libelant Norman
L. Bunker.

Acknowledgment of Service attached.

[Endorsed]: Lodged October 26, 1954.

[Endorsed]: Filed October 28, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Libelant, Harry C. Lower and Intervening Libelant, John Kadlec and Bogle, Bogle & Gates, their proctors; Intervening Libelants, George S. Herning, Edgar L. Peecher, William E. Barquist and Robert B. Allison and Lewis S. Armstrong, their proctors; Intervening Libelant, Norman L. Bunker and Robert C. Wells, his proctor; and

To: The Clerk of the Above Entitled Court:

You, and each of you, will please take notice that Fred I. Putnam and James A. Overman, Additional Intervening Libelants, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Decree in favor of libelant and intervening libelants above named entered in the above cause on the 28th day of October, 1954, for the reasons specified in their Assignments of Error filed herein, true copies of which are herewith served upon your proctors of record.

Dated this 26th day of November, 1954.

/s/ FRED I. PUTNAM

/s/ JAMES A. OVERMAN

Acknowledgment of Service attached.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

The appellants Fred I. Putnam and James A. Overman, hereby assign error in the proceedings, decrees, orders and decisions of the District Court in the above entitled cause as follows:

1. The court erred in failing to find and decree that the preferred marine mortgage of appellants Putnam and Overman is a first, prior, and superior lien against the vessel Silver Spray, or its proceeds.

2. The court erred in finding and decreeing that libelant Lower and intervening Libelants Herning, Peecher, Barquist and Bunker, or either of them, have any lien whatsoever against the vessel, or any cause of action either in personam or rem enforceable in admiralty.

3. The court erred in finding and decreeing that said libelant and said intervening libelants proved any damages, and this error is assigned regardless of whether the libels were or were not properly instituted and prosecuted within the admiralty jurisdiction of the District Court.

4. The court erred in finding that said libelant and said intervening libelants were employees rather than fishermen expecting to operate fishing lay.

5. The court erred in finding that said libelant and said intervening libelants were ready, able and willing to continue to perform their fishing con-

tracts, and that they or either of them were wrongfully discharged by abandonment.

6. The court erred in finding and decreeing that on June 7, 1954 the said libelant and said intervening libelants had valid causes of action against the vessel for damages to the extent of the claimed value of the share of each of them in and to a speculative tuna fish catch.

7. The court erred in finding that the Silver Spray was constructed and equipped as a tuna clipper for fresh bait fishing and refrigeration.

8. The court erred in finding that said libelant and said intervening libelants had or have causes of action properly instituted in admiralty rather than common law actions for fraud and deceit or money had and received.

9. The court erred in finding and decreeing that said libelant and said intervening libelants are entitled to recover \$7,500.00 each or any amount whatever.

10. The court erred in failing to make specific findings on damages as required by Admiralty Rule 46 $\frac{1}{2}$.

11. The court erred in finding and decreeing that said libelant and said intervening libelants are entitled to maritime liens for seamen's wages.

12. The court erred in decreeing that said libelant and said intervening libelants have superior maritime liens for prospective fishing shares on fish that were not caught.

13. The court erred in failing to find and decree that appellants Putnam and Overman are entitled

to a decree foreclosing their preferred ship mortgage as the first and only lien against the Silver Spray, and erred in failing to condemn said vessel and to order its sale to apply the proceeds to the payment of appellants' note and preferred marine mortgage.

14. The court erred in failing to find and decree that said libelant and said intervening libelants should be charged with all costs incurred.

15. The court erred in finding and decreeing that intervening libelant John Kadlec was hired by the owner Tobin to stand watches as a seaman on the shakedown cruise to Alaska; and further erred in finding and decreeing that John Kadlec is entitled to any recovery for wages for the reason that such a finding and adjudication is against the preponderance of credible evidence.

Dated this 26th day of November, 1954.

/s/ FRED I. PUTNAM

/s/ JAMES A. OVERMAN

Approved as to Form:

/s/ ANDERSON & COLLINS

/s/ LEONARD COLLINS

Acknowledgment of Service attached.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

ORDER CONFIRMING SALE OF VESSEL

This Matter having regularly come on for hearing this day upon the motion of libelant, and it being shown to the satisfaction of the Court that by the final decree entered herein the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment were condemned and ordered sold on November 15, 1954, and that pursuant to said decree a writ of venditioni exponas was duly issued out of this Court to the United States Marshal for this District, and that pursuant to said decree and writ the said Marshal did on the 15th day of November, 1954, sell the said vessel and her engines, tackle, apparel, furniture and equipment at public sale, and that the high bid therefor at said sale was the sum of \$11,000.00, the buyer being Yukon River Fishermen's Cooperative Association, Inc., a corporation, and that said price has been paid into the Registry of the Court, and that no person has objected to said sale, now on motion of libelant, it is

Ordered that the sale of the oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment to Yukon River Fishermen's Cooperative Association, Inc., a corporation, by the United States Marshal for this District, for the sum of \$11,000.00, be and the same is hereby confirmed.

Done in Open Court this 29th day of November,
1954.

/s/ JOHN C. BOWEN,
Judge

Presented and Approved as to Form:

/s/ M. BAYARD CRUTCHER

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, the Appellants, Fred I. Putnam and James A. Overman have filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit to reverse, modify and the decree entered by the District Court of the United States for the Western District of Washington, Northern Division, in the above-entitled cause on October 28, 1954, and to supersede said final decree; and

Whereas, the said Appellants are required to give an undertaking, under seal, in the sum of \$2,000.00 conditioned for the satisfaction of the use and detention of the proceeds of the sale of the Silver Spray including interest and costs, if for any reason the appeal is dismissed or if the decree is affirmed, and to satisfy in full such costs, interest and damages as the Appellate Court may adjudge and award.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, United Pacific

Insurance Company, a corporation organized and existing under the laws of the State of Washington, and duly licensed to transact a general surety business in the State of Washington, does hereby undertake and promise on the part of the Appellants that said Appellants will comply with the conditions as above set forth, and does further agree that upon default by the said Appellants in any of the conditions hereof, the damages and costs, not exceeding the sum aforesaid, may be ascertained in such manner as this Court shall direct; that this Court may give judgment hereon in favor of any person thereby aggrieved against it for the damages and costs suffered or sustained by such aggrieved party, and that said judgment may be rendered in the above-entitled cause or proceeding against it.

/s/ FRED I. PUTNAM

/s/ JAMES A. OVERMAN

[Seal] UNITED PACIFIC INSURANCE
COMPANY,

/s/ By J. A. HODSON,
Attorney-in-Fact

Approved this 29th day of November, 1954.

/s/ JOHN C. BOWEN,
Judge.

Approved as to form:

ANDERSON & COLLINS
By LEONARD COLLINS
Proctors for Tobin.

Acknowledgment of Service attached.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON BY
APPELLANTS PUTNAM AND OVERMAN

To the Clerk of the above entitled Court, and to
Bogle, Bogle & Gates, proctors for Libelant
Harry C. Lower and Intervening Libelant John
Kadlec; Robert B. Allison and Lewis S. Arm-
strong, proctors for Intervening Libelants
Herning, Peecher, and Barquist; Robert C.
Wells, proctor for Intervening Libelant Bunk-
er; Anderson & Collins, proctors for Respond-
ent Robert J. Tobin:

Please Take Notice that appellants Putnam and
Overman hereby adopt their fifteen assignments of
error dated November 26, 1954 as their statement
of points on which they intend to rely on this
appeal.

Dated at Seattle, Washington, this 14th day of
January, 1955.

PEYSER, CARTANO, BOTZER &
CHAPMAN,

/s/ By ARTHUR H. BOTZER,

Proctors for Putnam and Overman

Acknowledgment of Service attached.

[Endorsed]: Filed January 18, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure, and Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and stipulation of counsel, I am transmitting herewith as the record on appeal from the Decree filed Oct. 28, 1954 to the United States Court of Appeals at San Francisco, the following original papers:

1. Libel, filed June 10, 1954.
45. Intervening Libel in Rem and in Personam (Putnam and Overman), filed August 25, 1954.
52. Answer and Affirmative Defenses of Respondent Tobin to Libel and Intervening Libels of Lower, Bunker, Herning, Peecher and Barquist, filed Sept. 2, 1954, together with exhibit attached.
57. Reply of Libelant Lower, filed Sept. 8, 1954.
77. Findings of Fact and Conclusions of Law, filed Oct. 28, 1954.
78. Decree, filed Oct. 28, 1954.
89. Notice of Appeal, filed Nov. 29, 1954.
90. Assignments of Error, filed Nov. 29, 1954.

93. Supersedeas Bond (\$2,000.00), (UP I Co), filed Nov. 29, 1954.

99. Statement of Points Relied upon by Appellants Putnam and Overman, filed Jan. 18, 1955.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for preparation of the record on appeal in this cause, to-wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me on behalf of the appellants.

Witness my hand and official seal this 4th day of February, 1955, at Seattle, Washington.

[Seal] MILLARD P. THOMAS,
 Clerk
 /s/ By TRUMAN EGGER,
 Chief Deputy

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL APOSTLES ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure, and Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Cir-

enit, and Designation of counsel, I am transmitting herewith as supplemental apostles on appeal in the above-entitled cause, the following original papers in the file of the cause, to-wit:

5. Monition and Attachment with Marshal's Return thereon, filed June 15, 1954.

15. Intervening Libel of John Kadlec, Doss R. Payne and Norman L. Bunker, filed July 26, 1954.

33. Intervening Libel of William E. Barquist and Edgar L. Peecher, filed Aug. 16, 1954.

35. Intervening Libel of George S. Herning, filed Aug. 16, 1954.

37. Order Authorizing Withdrawal of Proctor Robert C. Wells for John Kadlec, filed Aug. 16, 1954.

47. Monition and Attachment on Intervening Libel of Fred I. Putnam and James A. Overman, filed Aug. 30, 1954 with Marshal's Return thereon.

63. Reply of Intervening Libelant Norman Bunker, filed 9-10-54.

66. Reply of Intervening Libelant George S. Herning, filed 9-13-54.

67. Reply of Intervening Libelants Edgar L. Peecher and William E. Barquist, filed Sept. 14, 1954.

95. Order Confirming Sale of Vessel, filed Nov. 29, 1954.

100. Designation by Appellants of Additional Original Documents for Certification to U.S.C.A., filed March 28, 1955.

Witness my hand and official seal this 8th day of April, 1954, at Seattle, Washington.

[Seal] MILLARD P. THOMAS,
 Clerk
 /s/ By TRUMAN EGGER,
 Chief Deputy

In the United States District Court for the Western District of Washington, Northern Division

No. 16039

[Title of Cause.]

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Seattle, Wash., Sept. 14, 1954, 2:00 o'clock, p.m.

Before: The Honorable John C. Bowen, District Judge. [1*]

Appearances:

M. Bayard Crutcher, of Bogle, Bogle & Gates, 603 Central Bldg., Seattle, Wash., appearing for and on behalf of libelant Harry C. Lower and intervening libelant John Kadlec.

Leonard Collins, of Anderson & Collins, 1114 Vance Bldg., Seattle, Wash., appearing for and on behalf of respondents The Oil Screw Silver Spray, her engines, etc., and Robert J. Tobin, and claimant Robert J. Tobin.

Robert C. Wells, 2703 Smith Tower, Seattle,

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Wash., appearing for and on behalf of intervening libelant Norman L Bunker.

Lewis S. Armstrong, 760 Central Bldg., Seattle, Wash., appearing for and on behalf of intervening libelants William E. Barquist and Edgar L. Peecher.

Robert B. Allison, 400 Central Bldg., Seattle, Wash., appearing for and on behalf of intervening libelant George S. Herning.

Stephen V. Carey, 811 New World Life Bldg., [2] Seattle, Wash, appearing for and on behalf of additional intervening libelants Fred I. Putnam and James A. Overman.

(The above-entitled case is called for trial by the Court.)

(Upon oral motion of Mr. Wells, the libel of Doss R. Payne is dismissed by the Court.)

* * * * *

The Court: You may now call your first witness or otherwise proceed with your case [3] in chief.

Mr. Crutcher: Mr. Lower.

HARRY C. LOWER

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Will you please state your full name?

A. Harry Charles Lower.

Q. Where do you live?

A. Hermiston, Oregon, 835 Orchard Street.

(Testimony of Harry C. Lower.)

Q. Are you the libelant in this action?

A. Yes.

Q. How old are you?

A. Thirty-two years old.

Q. Married? A. Yes. [4]

* * * * *

Q. How long were you in the Navy?

A. Four and one-half years.

Q. Were you at sea any of that time?

A. About three and a half years at sea. [5]

* * * * *

Q. Now, when did you first hear of Mr. Tobin, the respondent in this action?

A. Along the first of April—about April 11th I believe.

* * * * *

A. (Continued) I read in the "Portland Oregonian" an ad, advertising—

Q. Well, as a result of that ad, did you get in touch with Mr. Tobin?

A. Yes. Mr. Tobin got in touch with me. He [6] called me April 17th.

* * * * *

Q. And where did you meet Mr. Tobin?

A. In his home.

Q. Now, at that time did Mr. Tobin say anything to you relating to a vessel called the Silver Spray?

A. Yes. He pulled out a picture—

Q. That is sufficient. What did he say to you with respect to that vessel as concerns ownership?

(Testimony of Harry C. Lower.)

A. He said: "This is my boat. I own the Silver Spray." [7]

* * * * *

Q. Did he say what type of a vessel?

A. Said it was a tuna clipper.

Q. And did he say anything to you as to the equipment aboard that vessel?

A. He said it was fully equipped except for bait tanks; that he had the poles; and there was a lot of gear over in the gear locker.

Q. Did he say anything to you with respect to the capacity of the vessel?

A. He said it was a 49 ton net hold, 70 ton gross, I believe it was.

Q. Did he say anything to you with reference to intended use of that vessel?

A. He said that he had a contract with Van Kamp's cannery in San Diego, California; that he was going to take the vessel down there for tuna fishing.

Q. Did he say what time he intended to depart?

A. Said he planned to depart about May 15th.

Q. Incidentally, at this time where was the vessel Silver Spray?

A. He said it was in the Port of Seattle.

Q. Did he offer you a position on that vessel?

A. He offered me a working share in the vessel.

Q. And did he say anything to you with reference to the officers and other crew members of the vessel, whether they had already been employed?

A. He said he had one share left. He had just

(Testimony of Harry C. Lower.)

that morning sold a share to a cook in a marine hospital, and he had one share left.

* * * * *

Q. Now, at that time, did he show you any literature from Van Kamp?

A. Not at that time, no.

Clerk: This will be Libelant's Exhibit [9] No. 1.

(Booklet marked Libelant's Exhibit No. 1 for identification.)

Q. (By Mr. Crutcher): Showing you a booklet which has been marked for identification as Libelant's Exhibit 1, Mr. Lower, do you recognize that booklet?

A. Yes. That is the booklet I received when I went aboard the vessel.

Q. When did Mr. Tobin give that to you?

A. Oh, a couple of days after I went aboard the Silver Spray.

Q. As a result of the conversation which you had in Spokane, did you agree to go aboard the Silver Spray? [10]

* * * * *

A. Yes, I went aboard about the 21st or 22nd.

Q. That is of April? A. April.

* * * * *

Q. Well, while you were still in Seattle what services did you perform aboard the Silver Spray?

A. Any work that was designated by the skipper, Mr. Tobin. I painted, cleaned up, helped the engineer, helped down in the engine room, general deck work.

(Testimony of Harry C. Lower.)

Q. Where were you living during that time?

A. Aboard the boat.

Q. Now, thereafter, did you sail aboard the Silver Spray? [11]

* * * * *

A. May 18th.

Q. And the vessel departed for where?

A. Ketchikan, Alaska.

Q. And while the vessel was sailing from here to Ketchikan, did you perform any services on board?

A. Yes. I stood helmsman's watch, and I stood watch with Mr. Gehrig learning navigation.

Q. Did you stand a regular watch?

A. Yes.

Q. Now, about when did the vessel arrive in Ketchikan?

A. May 21st, close to there.

* * * * *

Q. When you arrived at Ketchikan, what occurred?

A. We stayed there that day. Mr. Tobin along about five o'clock in the evening said that he received a call to go to Wrangell after a load of shrimp, and he wanted the boat to proceed to Wrangell to pick up a load of shrimp. [12]

Q. All right. Did you proceed with the vessel?

A. Yes.

Q. Did Mr. Tobin remain with the vessel?

A. No. He stayed in Ketchikan.

* * * * *

(Testimony of Harry C. Lower.)

Q. And how many crew members were there?

The Court: Read the question.

(Last question is read by the reporter.)

A. I think 11 or 12. I forget which. Well, there were 11 or 12 altogether. Crew members—there was——

Q. You could name them if it would be easier.

A. Herning——

Q. What duties was he performing?

A. Stan Herning was working in the engine room, assistant engineer. There was Helge—I don't know his last name, a Norwegian engineer.

The Court: Was he an engineer? [13]

Witness: Yes, licensed engineer.

Q. (By Mr. Crutcher): Would that be George Helwig? A. I believe that is it.

Peecher—he stood helmsman's watch. Bert Fontague, which was the cook.

* * * * *

A. (Continued) Bill Barquist.

Q. What did he do?

A. He stood helmsman's watch.

Don Moore. He was the navigator, skipper, to take us up there.

Q. And was Mr. Kadlec on board?

A. Yes, John Kadlec.

Q. What services did he perform, if you know?

A. He stood helmsman's watch.

Q. Was he in the engine room?

A. He worked in the engine room part of the time. [14]

(Testimony of Harry C. Lower.)

Q. Now, on the way up, did Mr. Tobin perform any services?

A. He stood watch with Don Moore, Mr. Moore.

Q. And was Mr. Payne on board?

A. Doss Payne? Yes.

Q. And what did Mr. Payne do?

A. He stood a watch, helmsman's watch.

Q. Where there any other people on board?

A. Mr. Jim Gehrig.

* * * * *

Q. You say he was navigator——

A. He was navigator on the off watch.

Q. Was there anybody else on board?

A. Dr. Trowbridge. [15]

* * * * *

Q. Now, at Ketchikan how many of these men got off?

A. Doss Payne, Dr. Trowbridge, Mr. Tobin, Mr. Gehrig.

* * * * *

Q. Now, you went on to Wrangell you said, and then what happened then? Where did you go from there?

A. We proceeded back to Ketchikan.

Q. And did you thereafter see Mr. Tobin?

A. When we got to Ketchikan I saw Mr. Tobin. I went up to the Stebbin Hotel Coffee Shop with him. [16]

* * * * *

Q. It would be May 24th then I believe, is that right?

A. May 24th.

(Testimony of Harry C. Lower.)

Q. Did you have a discussion with Mr. Tobin at that time? A. Yes. [17]

* * * * *

Q. Did Mr. Tobin at that time give you any instructions as to what was to be done with the vessel?

A. He said take the booms off, the jig booms, the booms for tuna; take them off of the boat.

Q. And did he state anything to you with reference to the use which was to be made of the vessel?

A. He said that it was going to be used here in Alaska for hauling cargo.

Q. At that time did he say anything to you with reference to tuna fishing? A. No.

Q. Did he say anything to you at that time about a hunting lodge?

A. Yes. He said they had a site picked out for a hunting lodge there in Alaska.

Q. Did he say anything about how the vessel would be used in connection with that?

A. To haul clients up there to the hunting lodge and supply the hunting lodge. [18]

* * * * *

Q. Now, do you know whether Mr. Tobin thereafter left the City of Ketchikan? A. Yes.

Q. When did he leave?

A. That same day.

Q. Did you have any other discussions with him before he left?

* * * * *

A. He said that he was leaving for Seattle to

(Testimony of Harry C. Lower.)

get money that was deposited in the bank here for the [19] shrimp that we didn't pick up, that he had money deposited here in the bank, here in Seattle, and I also give him the receipts at that time for the money that I spent in Wrangell for repairs to the Silver Spray.

Q. And at that time did he say anything with reference to returning to Ketchikan?

A. No, he did not.

Q. At that time did he say anything about plans for tuna fishing? A. No.

Q. Now, did you again see Mr. Tobin on that day before he left for Seattle? A. No.

Q. That is, before he left Ketchikan. Did you receive any money from Mr. Tobin?

A. Approximately \$80.00.

* * * * *

Q. Did he state the purpose of that money?

A. He said it should be used for ship's money.

Q. And at that time did Capt. Moore have any ship's money? A. No. [20]

* * * * *

Q. And did Capt. Moore at that time make any remark to you as to the use of the vessel?

A. He said: "It looks like we are going to use it for cargo work around Alaska." [21]

* * * * *

Q. Was anything done about employing the vessel for cargo work?

A. Don Moore went out and tried to find some cargo to haul around there.

(Testimony of Harry C. Lower.)

Q. Was there any work found? A. No.

Q. Did you make any inquiries yourself?

A. Yes. When I left Mr. Tobin's room with Don Moore, we had no credit in Ketchikan. He says: "We need some supplies."

Q. Well, now, that will suffice. You did make inquiries? A. Yes.

Q. As a result of those inquiries, did you learn whether there was work available at Ketchikan, whether or not there was work available?

A. No, there wasn't.

Q. Did you learn the fact——

A. I learned the fact that there was no work available.

Q. All right. Now, subsequent to that week during which you lay in Ketchikan, where did the vessel go?

A. Back to the port of Seattle.

Q. And at what time on what date did you arrive [22] back in Seattle?

A. Approximately June 3rd.

* * * * *

Q. Do you recall the approximate time of the day on which you arrived back at Seattle on June 3rd?

A. Approximately 5:30 in the morning.

Q. And on that day did you again make contact with Mr. Tobin? A. Yes. [23]

Q. Where?

A. The Edmond Meany Hotel.

Q. Did you see him there? A. Yes.

(Testimony of Harry C. Lower.)

Q. Now, at that time was any one else present?

A. Don Moore.

Q. And at that time did you have any conversation relative to the ship's money which you had received?

A. No.

Q. At that time did you have any discussion about tuna fishing?

A. No.

Q. Had you met Mr. Gehrig prior to this time?

A. Yes.

Q. Had Mr. Tobin introduced Mr. Gehrig to you? [24]

* * * * *

A. Yes, he said Mr. Gehrig was his business agent.

Q. And did he say that with reference to any particular subject or transaction?

A. He will handle his business here in Seattle.

Q. Now, after talking to Tobin, did you talk with Mr. Gehrig?

A. Yes.

Q. What day was this?

A. The next day.

Q. That would be June 4?

A. June 4 of this year.

Q. And at that time when did you and where did you talk with Mr. Gehrig?

A. Aboard the Silver Spray.

Q. At that time where was Mr. Tobin, if you know?

A. I believe he was in Spokane.

Q. Did you discuss with Mr. Gehrig the use of the vessel?

A. Yes.

(Testimony of Harry C. Lower.)

Q. What was the object or subject of that conversation if you recall?

A. Mr. Gehrig said: "We are going to have to salvage something out of this. We are going to have to [25] put the vessel to work to get our money back and get some money out of it." He suggested we incorporate.

Q. Did Mr. Gehrig say anything to you about tuna fishing? A. No.

Q. After you arrived back at Seattle on June 3, was any work undertaken on the vessel to outfit it for fishing? A. No.

Q. Now, were you aboard on June 5?

A. No.

Q. Were you aboard on June 4?

A. Part of the day. I left in the evening.

Q. Who was on board still at that time?

A. There was Skipper Don Moore and the rest of the men, and the engineer, George Helwig or whatever, and the crew members came and went that day.

Q. How was the food on board so far as the supply was concerned?

A. There was very little food.

Q. On the occasion of your conversation with Mr. Gehrig was any one else present?

A. Yes.

Q. Who else?

A. Ed Peecher, and I don't know whether John [26] Kadlec was there or not; I think he might have been for part of it.

(Testimony of Harry C. Lower.)

Q. When you said that Mr. Gehrig suggested you incorporate, to whom was he referring?

A. To the shareholders. * * * * * [27]

Q. Now, did you make any subsequent efforts or did Mr. Lower make any subsequent efforts in your presence to get in touch with Mr. Tobin?

A. Yes.

Q. And on what day was that?

A. That is on June 5.

Q. That would be a Saturday, would it not?

A. Yes.

Q. And were you able to get in touch with him?

A. No.

Q. Did you make any effort to get in touch with Mr. Gehrig? A. Yes.

Q. And did you talk with Mr. Gehrig?

A. Once that day, yes, I talked to him.

Q. What was the subject of that conversation?

A. I asked him if he had got in touch with Mr. Tobin and what Mr. Tobin said about returning the money that I had invested, the working share in the vessel. [29]

Q. And what did he say?

A. He said that he had been unable to get in touch with Mr. Tobin.

Q. Did he make any statement to you with reference to the return of the money?

A. He said: 'Give me a little time.'

Q. At that time did he say anything to you about proceeding, the vessel proceeding, South to fish for tuna? A. No.

(Testimony of Harry C. Lower.)

Q. And thereafter did you consult legal counsel as to what your rights or remedies might be?

A. Yes.

Q. And who was that counsel?

A. Bogle, Bogle & Gates and Mr. Crutcher. [30]

* * * * *

Q. Subsequent to June 6th, which was that Sunday, what did you do?

A. I returned to Hermiston.

Q. When did you remove your gear from the Silver Spray? A. On the 4th. [32]

* * * * *

Q. Incidentally, and referring back in your testimony, at the time that you first discussed this matter with Mr. Tobin in Spokane on April 17th, did he make any reference with regard to the length of the tuna fishing season?

A. He said it would run into October. [33]

Q. Commencing when? When was the vessel to depart from Seattle? A. May 15th.

* * * * *

Q. Now, at that time, did Mr. Tobin make any statement to you with reference to what you might reasonably expect to earn during the season?

A. He said that I could reasonably expect over \$5,000.00. He said he was telling all his men \$5,000.00.

Mr. Crutcher: I have no other questions.

The Court: You may cross examine on behalf of any opposing litigants.

(Testimony of Harry C. Lower.)

Cross Examination

Q. (By Mr. Collins): Mr. Lower, what is your present address?

A. 835 Orchard Street, Hermiston, Oregon.

Q. You entered into an arrangement with Mr. Tobin? A. Yes.

Mr. Collins: May I please submit this document, Your Honor? [34]

The Court: Yes, you may. Do you wish it marked for identification?

Mr. Collins: Yes, Your Honor.

The Clerk: Respondent's Exhibit A-1.

(Contract marked Respondent's Exhibit A-1 for identification.)

Q. (By Mr. Collins): You have a document before you marked for identification as Respondent's A-1. Is that the contract offered to you by Mr. Tobin? A. Yes.

Q. Did you sign that agreement?

A. Yes.

Q. Did your wife sign the agreement?

A. Yes.

Q. You studied that agreement over a period of two or three days, did you not? A. No.

Q. Did you not take that agreement home to have your wife look at it and read it?

A. No. My wife was there with me.

Q. Did you understand the terms of it?

A. As well as I could, yes. [35]

Q. You understood that it was a working share in the Silver Spray?

(Testimony of Harry C. Lower.)

A. That I was a crew member in the Silver Spray, working share.

Q. And at that time you gave Mr. Tobin \$2500.00 as your share? A. Right, yes, sir.

Q. Did you and Mr. Tobin discuss this agreement? A. Yes.

Q. Then you understood that he was to manage the voyage of the vessel?

A. He was to be the skipper.

Q. And he, in the use of his discretion, could direct the vessel's movements? A. Yes.

Q. You then understood that if you cared to leave the vessel you would give Mr. Tobin 30 days' notice? A. Yes.

Q. Did you give Mr. Tobin 30 days' notice?

A. Yes.

Q. Did you give Mr. Tobin 30 days' notice?

A. No.

Q. You also understood that Mr. Tobin had the option to release you if he wanted to?

A. Yes. [36]

Q. And in either event, whether you gave notice or he should release you, you agreed under this writing to give him 90 days' notice to sell your share? A. Yes.

Q. (Continued) —and give your money back?

A. Yes.

Q. And you also understood under this agreement that you would do nothing to hinder the operation of this vessel, right? A. Yes.

(Testimony of Harry C. Lower.)

Q. You say the vessel arrived back in Seattle on June 3rd and you went to see Mr. Crutcher?

A. Not on June 3rd, no.

Q. Pardon me. You are correct. I will change the question. You say the vessel arrived in Seattle on June 3rd and thereafter you saw Mr. Crutcher, the attorney?

A. Yes.

Q. And through Mr. Crutcher you libeled this vessel?

A. Yes. [37]

* * * * *

Q. Did Mr. Tobin give you any reason to believe the contract was not in force?

A. He didn't carry out to go tuna fishing.

Q. And you didn't carry out the terms of your separation from the vessel, did you?

* * * * *

A. I tried to get in touch with Mr. Tobin and I could not. [38]

* * * * *

Q. Did you not, with other crew members, meet with Tobin and discuss the Alaska trip?

A. I was a crew member. Of course we discussed it. We were crew members. Mr. Tobin directed us to go to Alaska.

Q. Was it with your permission and with your consent?

A. It was with my consent that he said he was going to Alaska and then return and go tuna fishing.

Q. Now, what was that cruise for?

A. He represented it as more or less a shake-down cruise. The shrimp money received from the

(Testimony of Harry C. Lower.)

shrimp would pay for it. There might be certain crew members that didn't work out that he didn't want to take with him on his fishing venture to Southern waters.

Q. You had no objection to the voyage as such, did you? A. No.

Q. Now, where is the first place you stopped in Alaska?

A. Stopped at Ketchikan, Alaska. [39]

Q. And that is where you say these men left the vessel, Payne, Trowbridge, Tobin, Gehrig?

A. Yes, sir.

Q. You didn't mention Peecher, but he left, too, didn't he? A. Yes, he did.

* * * * *

Q. Why did Mr. Peecher leave?

A. He couldn't stand the cold weather. His hands were crippled up and he wanted to return to the States.

Q. Then he left the vessel of his own volition, did he not? A. Yes.

Q. Peecher is one of the libelants in this [40] case, is he not? A. Yes.

Q. Tobin received a call from Seattle to return, did you so testify? A. No.

Q. Do you know why Tobin left?

A. He said he left to come down and pick up the money that was in the bank down here on deposit. * * * * *

Q. And you all consented to it, did you not?

A. We didn't have a chance to consent.

(Testimony of Harry C. Lower.)

Q. But you knew that when Tobin left the vessel he did so on Silver Spray business?

A. That is as far as I know, yes. [41]

* * * * *

Q. Now, isn't it true, Mr. Lower, that this entire trip was, as Mr. Tobin said, merely a shake-down cruise and an experiment to try out the vessel?

A. No. I don't think it was that at all. After we got up there and there was nothing, no shrimp there, nothing there—— [42]

* * * * *

Q. The Alaska trip was a good-natured one, was it not?

The Court: So far as relationship between whom?

Mr. Collins: Between all on board.

A. No, I wouldn't say that. Mr. Peecher didn't like it a bit that we were going to Alaska.

Q. Without any reflexion on any one on board, was there quite a bit of drinking and partying?

A. Quite a bit? How much do you mean by "quite a bit"?

Q. Well, I mean as might be normal among men on a trip of that kind. [43]

* * * * *

A. No. There was no excessive drinking.

Q. I didn't ask if there was excessive drinking, but then there was friendly drinking on the trip?

A. When the men got off watch, they might have taken a drink, yes. * * * * *

(Testimony of Harry C. Lower.)

Q. You say that from the time Tobin left the vessel in Ketchikan you heard nothing more concerning his intentions to tuna fish?

A. No. Yes. I never heard any more about tuna fishing. [44]

Mr. Collins: May I submit a document?

The Court: You may have it marked if that is what you wish.

The Clerk: Respondent's Exhibit A-2.

(Copy of telegram marked Respondent's Exhibit A-2 for identification.)

The Court: Do you intend to offer in connection with this witness's interrogation Respondent's Exhibit A-1?

Mr. Collins: Thank you, Your Honor. I offer A-1 in evidence, it having been identified.

Mr. Crutcher: At the same time I will offer Libelant's 1 in evidence, which I see I omitted.

The Court: Libelant's Exhibit 1 is admitted. Respondent's Exhibit A-1 is likewise admitted.

(Libelant's Exhibit No. 1 received in evidence.)

(Respondent's Exhibit A-1 received in evidence.) [45]

Q. (By Mr. Collins): Mr. Lower, you have before you a telegram. Did you not receive that telegram or the original of it?

The Court: It has been marked Respondent's Exhibit A-2.

Q. (Continued) You received the telegram from Mr. Tobin in Seattle, did you not?

(Testimony of Harry C. Lower.)

A. I did a day after it was sent.

* * * * *

Q. What does it say, sir?

The Court: Do you wish to offer it in evidence?

Mr. Collins: Yes. I offer A-2 in evidence.

The Court: It is now admitted.

(Respondent's Exhibit No. A-2 received in evidence.) [46]

* * * * *

Q. (By Mr. Collins): Thereupon you did return to Seattle? A. Yes.

Q. And you arrived here June 3, and you and Mr. Moore saw Tobin at the Edmond Meany Hotel?

A. Right, yes, sir.

Q. And you at that time, you and Mr. Tobin, in Capt. Moore's presence, discussed tuna prospects? A. Not that I remember, no.

Q. Would you say that you did not discuss tuna prospects?

A. No, that is right; we did not.

Q. I can't hear you too well.

A. We did not discuss tuna prospects.

Q. Well, what did you discuss?

A. Oh, he said that he was flying about getting another boat, and we were going to run both boats. He [47] didn't know—he might send the Silver Spray South, and he might send the other boat up to Alaska; he didn't know.

Q. Did it make any difference to you?

A. I—at that time I was so heartsick—I knew

(Testimony of Harry C. Lower.)

there was nothing more. Anything he said I couldn't believe.

Q. Then you made no demands that the Silver Spray go tuna fishing? A. No. [48]

* * * * *

Q. A moment ago you said you were disgusted about the whole thing. What did you mean by that?

A. Because we hadn't went tuna fishing. It looks like he wanted to run to Alaska all the time.

Q. There were various different ventures under consideration, were there not?

A. At what time was this?

Q. Well, didn't you gentlemen speak of the freight to Alaska or Mr. Tobin might have two or three boats running and some of you men might be on one and some on the other, some on the Silver Spray?

A. That is what he tried to present to us, yes.

Q. Well, you and Mr. Tobin and the other shareholders were experimenting in this field, were you not? A. No, no.

Q. Have you ever tuna fished? [49]

A. No.

Q. You admit that there was no wage agreement at any time?

A. There was the promise of money coming in.

Q. That is share money on the catch of fish?

A. Yes.

Q. Now, after you and Mr. Moore left the hotel you proceeded back to the vessel?

A. No. We went over to Jim Gehrig's house.

(Testimony of Harry C. Lower.)

Q. And then you went back to the vessel after that? A. Yes.

Q. And how long did you stay aboard?

A. Practically all day I believe.

Q. Did you have a meeting at that time with the other men?

A. Most of the men were gone home.

Q. When you came down through the Sound the vessel hit a log? A. Yes.

Q. And it had to be laid up as far as you knew for several days?

A. I didn't know what the extent of the damage was.

Q. But you knew it had to be laid up for repairs? [50] A. Yes.

* * * * *

Q. Were you not told before you docked that you and the other men could go ashore for several days, go home during the time the vessel was in drydock?

Mr. Crutcher: Object, Your Honor, unless he identifies the person who is telling him this.

The Court: The objection is sustained.

Q. (By Mr. Collins): Using the same question, were you not told so by Don Moore?

A. That I could go home for several days?

Q. That all of you men could go home for several days during drydocking?

A. I never heard him tell the rest of the men that they could go home. He might have told them—not [51] in my presence.

(Testimony of Harry C. Lower.)

investment back, your investment of \$2500.00? [56]

* * * * *

A. Well, I wanted to give Mr. Tobin every opportunity in the world, and I was heartsick. I didn't know what to do. I honestly didn't know what to do, so I went and got legal counsel.

* * * * *

Q. You wanted your \$2500.00 back? Correct?

A. Yes.

Q. And isn't that the reason you saw counsel about bringing this suit? A. Yes.

Mr. Collins: That is all.

(Discussion.)

Cross Examination

* * * * * [57]

Q. (By Mr. Carey): You said that you answered or saw an ad in the paper on April 11, 1954. Where were you at that time?

A. I was in Hermiston, Oregon.

Q. And in what paper did you see it?

A. Portland Oregonian. * * * * * [59]

Q. At the time that you had these conversations in Spokane immediately following April 17th or on April 17th, they wholly concerned the proposed tuna fishing operation? A. Yes, sir.

Q. And that was the only thing that was discussed up to the time you signed the contract?

A. Yes.

Q. Nothing was said about any proposed freight-ing to and from Alaska? A. No, no.

(Testimony of Harry C. Lower.)

Q. At some time or other you put up \$2500.00?

A. The same night.

Q. That same night?

A. I signed the contract.

Q. And that was to buy in a share on a tuna fishing operation?

A. Working share on a tuna clipper.

Q. Had you ever had any tuna fishing experience of any kind? A. No, sir.

Q. Any kind of fishing experience?

A. Sport fishing is all, sir. [60]

* * * * *

Q. You departed for Alaska on May 18?

A. Yes, sir.

Q. What were you doing between April 23 and May 18? A. Working on the boat.

Q. For what purpose?

A. Getting it ready. I was painting and doing whatever work Mr. Tobin——

Q. And that was in projects for the proposed tuna operation? A. Yes.

Q. When did the matter come to your attention of a proposed trip to Alaska?

A. About two days before we left. He mentioned something about shrimp in Alaska. [61]

Q. That would be May 16th or thereabouts?

A. Yes.

Q. Did you object to that?

A. I was under his orders; I had to go.

Q. My question is: Did you object to that?

(Testimony of Harry C. Lower.)

A. Inside, yes, I mean, but not outwardly to him, no.

Q. As far as anybody could discern, outwardly you did not object to that? A. No.

Q. You had no contract, either written or oral, for any wages to and from Alaska?

A. No, sir. [62]

* * * * *

Q. Did you make any inquiry as to whether Mr. [63] Tobin was the sole owner or whether there were any obligations against the boat?

A. Mr. Tobin told me he was the sole owner of the boat, and he had a mortgage on the boat.

Q. And you think he misrepresented to you on that account?

A. The date I signed my contract, yes.

Q. And you put up \$2500.00 relying upon what he said? A. Yes.

Q. And you now think you have been deceived?

A. Well, he didn't—

Q. Do you now think you have been deceived?

A. In what way?

Q. I am inquiring of you. Do you now think that Tobin deceived you? A. Yes.

Q. And the purpose of your lawsuit is to try to get back your \$2500.00 that he deceived you of?

* * * * * [64]

A. The purpose of my lawsuit is to get back—I had a contract to go to Greenland which amounted to \$8,000.00, and the salmon—I mean the tuna for the summer which I have lost, all the time I have

(Testimony of Harry C. Lower.)

lost, and everything I have lost, I am trying to get compensation for it.

Q. (By Mr. Carey): You are trying to get damages because you claim Tobin deceived you, is that right? A. Yes. [65]

* * * * *

Q. These proposed operations in Alaska, hauling freight back and forth possibly, engaging another boat, operating a hunting lodge and hauling passengers back and forth in connection with the hunting lodge, were [66] those operations to be conducted before you went tuna fishing or after you got back? A. Well, he said right then.

Q. Pardon? A. Right then.

Q. Did you agree to that proposal?

A. I was heartsick. I didn't know what to do.

Q. I didn't ask you about your condition. I asked you if you agreed to it.

A. Well, I had to. I was a crew member. Yes, sir.

Q. You did agree to it? A. Yes. [67]

* * * * *

Q. And I will ask you the direct question. Are you now saying that in negotiating this contract with you [71] Tobin told you the truth or deceived you?

A. You mean the whole contract—is it wholly true or wholly false?

Q. At the time you negotiated this contract with Tobin on April 17th and you put up \$2500.00, are

(Testimony of Harry C. Lower.)

you now claiming that Tobin told you the truth or
cheated you? A. Cheated me.

Mr. Carey: That is what I thought. That is all.
* * * * * [72]

(At 4:45 o'clock p.m., Tuesday, September
14, 1954, proceedings recessed until 10:00 o'clock
a.m., Wednesday, September 15, 1954.)

Seattle, Wash., Sept. 15, 1954, 10 o'clock a.m.
* * * * * [73]

Cross Examination—(Continued)

Q. (By Mr. Collins): Now, then, when did you
talk to Mr. Crutcher?

A. When? The first time?

Q. Yes. A. On June 5th. [75]
* * * * *

Q. Was that before or after you went to Her-
miston? A. That was before. [76]
* * * * *

Mr. Collins: No further questions. [80]
* * * * *

Redirect Examination

Q. (By Mr. Crutcher): Now, Mr. Lower, there
are a couple of points which I failed to clarify orig-
inally, and one of those was did you receive any
monies either from Mr. Tobin, the owner, or from
Capt. Moore, the master, or from Mr. Gehrig, the
business agent, or from any one else connected with
the Silver Spray for the services which you per-
formed aboard the vessel? A. No.

(Testimony of Harry C. Lower.)

Q. Was the \$80.00 which you received for ship money in Ketchikan sufficient for the needs of the vessel during the time you were in Alaska after Mr. Tobin left? A. No. [81]

* * * * *

Q. On cross examination you were asked whether you had been fired, in so many words, and you said no. Are you referring now to words of discharge used by Mr. Tobin or are you reaching a legal conclusion? * * * * *

A. Guess I was reaching a legal conclusion.

Q. (By Mr. Crutcher): Well, did Mr. Tobin ever ask you to leave the service of the vessel in so many words? A. No.

Q. You were also asked on cross examination whether you objected to going after shrimp in Alaska. Were you consulted by Mr. Tobin and asked for permission to go?

A. No. I was told we were going to Alaska.

Q. At any time did Mr. Tobin call a meeting [83] of the crew members or the working shareholders and either inform them or ask them anything about the abandonment of the tuna venture?

A. No. * * * * *

Q. You also said on cross examination that you agreed to work cargo in Alaska with the Silver Spray. Were you asked by Mr. Tobin for permission to engage in such work? * * * * * [84]

A. No.

(Testimony of Harry C. Lower.)

Q. (By Mr. Crutcher): Did you tell Mr. Tobin you wanted to go to Alaska? A. Yes.

Q. On what occasion was that?

A. Just before we left.

Q. In connection with what conversation was that remark made, do you recall?

A. Well, he said: "We are going to Alaska," and I said: "Okay".

Q. Was that in connection with the initial cruise? A. Yes.

Q. Had he told you or did you understand that you were not going tuna fishing? A. No.

Mr. Crutcher: I have no other questions.

* * * * *

The Court: Call the next witness. [85]

Mr. Crutcher: I wish to read into evidence the interrogatory and answer to interrogatory No. 1. This was filed on August 31, 1954 and is entitled "Interrogatories Propounded to Respondent".

* * * * *

Mr. Crutcher: The first interrogatory, No. 1: "On what date did you become the owner of the vessel Silver Spray?" Answer: "On or about April 28, 1954."

I wish next to read into evidence [86] interrogatory No. 8: "State whether you made any arrangements or agreement with any person or business firm to use the Silver Spray for tuna fishing during the 1954 season. If your answer is yes, state with whom you made the arrangement or agreement, and when." Answer: "Yes, I had arrangements with

(Testimony of Harry C. Lower.)

Lower, Herning, Peecher, Barquist, Bunker to use the vessel for tuna during the 1954 season." [87]

* * * * *

FERN LOWER

called as a witness by and on behalf of libelant Harry C. Lower, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Will you please state your name to the Court?

A. Fern Lower.

Q. And are you the wife of Mr. Harry C. Lower, the libelant in this action?

A. I am.

* * * * *

Q. And are you acquainted with the transaction [89] which took place in Spokane on April 17th?

A. I am. [90]

* * * * *

Q. Passing on now to the next time when you saw Mr. Tobin, did you ever see Mr. Tobin again?

A. No. That was the one and only time I ever saw him.

Q. Did you come to Seattle on June 5th?

A. I came to Seattle on June 4th.

Q. And that was—— A. Friday.

Q. The time the vessel arrived back in Seattle, was it not? A. The day following.

Q. Did you attempt to see Mr. Tobin on that day?

A. I attempted to find out where Mr. Tobin was.

(Testimony of Fern Lower.)

Q. And what sort of inquiry did you make?

A. I contacted Mr. Gehrig as to Mr. Tobin's whereabouts.

Q. And did Mr. Gehrig tell you?

A. Mr. Gehrig informed me that Mr. Tobin was in Spokane.

Q. Did you attempt to contact Mr. Tobin in [92] Spokane?

A. I did. I asked Mr. Gehrig for Mr. Tobin's telephone number. I called. Mr. Tobin was not there.

* * * * *

Q. Did Mr. Gehrig at that time make any representations to you as to the continuation of the tuna fishing venture?

A. May I relate my conversation with Mr. Gehrig?

Q. Very well.

A. I called Mr. Gehrig, and I said: "In view of the fact that Mr. Tobin has removed himself from the Silver Spray and removed himself from the City of Seattle, I am forced to get in touch with you as his business agent." I said: "I am at this time making formal [93] demand on you for the \$2500.00 which we used to purchase a share of the vessel." I said: "I believe you know, Mr. Gehrig, that we signed a contract with Mr. Tobin to go tuna fishing. The boat was to leave Seattle on May 15th. Today is June 5th." I said: "The boat is still here."

(Testimony of Fern Lower.)

Q. Did Mr. Gehrig say anything in answer to that?

A. He didn't get a chance to until just about that time, and then he said: "Mrs. Lower, I don't have any money. I have never at any time handled any of Mr. Tobin's money."

Q. Well, did he say anything about continuing the tuna venture?

A. No. Here is what he said. He said: "Give me an hour. I will see if I can get hold of Mr. Tobin. Then call me back." I said: "I will see if I can get hold of Mr. Tobin."

That is when I called Spokane. I couldn't locate the man so I called Mr. Gehrig back, and I said: "Now, if you would care to give us our \$2500.00, we will settle for that and go home and forget the fact that we have lost six weeks of work on the vessel; that we have been deprived of a season of fishing."

Q. Well, you don't have to go into that at this [94] time. I am primarily interested in what Mr. Gehrig had to say about the plans or intentions of Mr. Tobin.

A. He said: "Don't be hasty. Don't take any action. If the crew will stick together, we can still salvage something out of this. I know it looks bad, but I think we can incorporate and leave Mr. Tobin out of it."

Q. Was that, when he said "we", did you understand that he was referring to the working——

A. The crew members. * * * * *

(Testimony of Fern Lower.)

Q. When you said you had, during the course of your relation of that telephone call that you had, purchased a share of the vessel, did you misspeak yourself? Did you understand that you were purchasing a share of the vessel?

A. No. We understood we were purchasing a working share, and it was explained to us that that meant simply we went aboard and fished and had a share of the catch. [95]

* * * * *

Q. Was there any further conversation that you ever had with Mr. Gehrig or Mr. Tobin?

A. No. I told Mr. Gehrig at that time that if he couldn't settle with me—we would be glad to settle for the \$2500.00—if he couldn't, that we had to——

Q. No. That is not necessary.

A. Then that is all.

Mr. Crutcher: I have no other questions.

You may cross examine.

Cross Examination

Q. (By Mr. Collins): Mrs. Lower, you met with your husband and Mr. Tobin in Spokane?

A. I did.

Q. And you signed this agreement?

A. I did.

Q. You understood the agreement?

A. I understood it, yes. [96]

* * * * *

(Testimony of Fern Lower.)

Q. What led you to believe that Mr. Gehrig was Mr. Tobin's agent?

A. I said: "Mr. Gehrig, are you Mr. Tobin's [97] business agent, and he said: "Yes, I am."

Q. And so all the answers that you have given to Mr. Crutcher are based upon the fact that Gehrig claims that he was an agent?

A. Yes.

* * * * *

Q. But you have no confirmation of this agency from Mr. Tobin directly? A. No. [98]

* * * * *

Mr. Collins: I have no further questions.

Cross Examination

* * * * * [102]

Q. (By Mr. Carey): Referring to this conversation you had with Mr. Gehrig, did you have but one conversation with him?

A. I had two telephone conversations.

Q. I am referring to the occasion when you made a formal demand you say for \$2500.00.

A. Yes.

Q. Was that by telephone or face to face?

A. That was by telephone.

Q. Was that the only demand you made?

A. Yes.

Q. And that was on June 5? A. Yes.

Q. And where was your husband at that time?

A. He was standing right with me. [103]

* * * * *

(Testimony of Fern Lower.)

Q. (By Mr. Carey): Did you accuse Mr. Tobin of having treated you and your husband unfairly in connection with the execution of this undertaking?

A. Yes. May I state in what manner?

The Court: You may.

Q. Yes. Go ahead. That is what I am getting at.
Mr. Tobin, when we signed our contract with [105] him to go tuna fishing, said the boat would leave Seattle on the 15th day of May. This was June 5th. The boat wasn't tuna fishing and it wasn't ready to go tuna fishing.

Q. And you thought that he had misrepresented things to you and had overreached himself?

A. Yes.

Q. And that is what you accused him of?

A. Yes, I accused him of.

Mr. Carey: That is all. [106]

* * * * *

JOHN KADLEC

called as a witness by and on behalf of libelant Harry C. Lower, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Will you please state your full name to the Court?

A. John Kadlec.

Q. Where do you live, Mr. Kadlec?

A. 4409 26th S.W. [108]

* * * * *

(Testimony of John Kadlec.)

Q. What is your occupation?

A. I am going to school, Broadway Edison.

* * * * *

Q. Mr. Kadlec, you are one of the libelants in this cause, are you not? A. Yes.

Q. Have you had any experience with vessels of any kind?

A. I have had very little experience with vessels, but I have an AB card signed for the port of South Chicago.

Q. Have you had experience on some other vessel than the Silver Spray? [109]

A. SS Linderbury.

Q. In what capacity did you serve aboard that vessel?

A. Wiper, ordinary seaman and freight handler.

Q. What was your rate of pay in that work?

* * * * *

A. It was around \$500.00 a month, room and board.

Q. You mean \$500.00 plus room and board?

A. Yes.

Q. How did you first hear of Mr. Tobin?

A. I answered an ad in the Seattle Times.

* * * * *

Q. Did you later pay him some money for a working share in a vessel? A. Yes.

Q. When was that?

A. The 14th of April, 1954. [110]

Q. And what vessel was that that you agreed to work on?

(Testimony of John Kadlec.)

A. I agreed to work on the—the share was sold on the Sockeye. It also stipulated it was on the tuna clipper, the Silver Spray.

* * * * *

Q. Can you explain that briefly?

A. Yes. He told me that I would get a third of a share on the Sockeye, or, in other words, if I bought a place on the Silver Spray I would receive \$100.00 a week.

Q. And when did you go to work for Mr. Tobin?

A. Approximately the 28th of April.

Q. What vessel did you go aboard?

A. The Silver Spray.

Q. Did you ever work for the Sockeye?

A. A little bit off and on.

Q. Was this after the 28th of April or before?

A. This was after.

Q. And what sort of work did you do aboard that vessel?

A. I painted it and did mechanical work, in the lavatories and general cleaning, general hand on the [111] boat.

* * * * *

Q. Did you accompany the vessel to Alaska?

A. Yes.

Q. What did you do generally on the trip North?

A. On the trip North I was assistant engineer.

Q. Did you stand a regular watch?

A. Yes.

Q. Which watch was it?

(Testimony of John Kadlec.)

A. I don't recall the exact watch it was. It was at midnight I believe.

Q. Before you left on that trip did Mr. Tobin consult with you as to the taking of the vessel North? A. No.

Q. Did you accompany the vessel from Ketchikan to Wrangell? A. Yes.

Q. Did you stand any watch on that trip?

A. From Ketchikan to Wrangell I was helmsman.

Q. Did you stand a watch on the voyage from Wrangell back to Ketchikan? [112]

A. Yes.

Q. What watch was that?

A. It was the same watch.

Q. Did you see Mr. Tobin after you returned to Ketchikan?

* * * * *

A. He asked me if I was satisfied on this boat, this Silver Spray, and that if I was satisfied, he would not replace me when we got back to Seattle.

* * * * * [113]

Q. Did Mr. Tobin pay you any of the wages which accumulated up to that time?

A. I received \$5.00. That was all.

* * * * *

Q. Were you on the vessel when it returned to Seattle? A. Yes.

Q. Did you perform any service on that voyage?

A. On the return?

Q. Yes. A. Yes. I was a helmsman.

(Testimony of John Kadlec.)

Q. When you returned to Seattle, did you stay
[114] aboard the vessel? A. No. [115]

* * * * *

Q. While you were there aboard this vessel after it had returned from Seattle, did any person aboard the vessel remove his gear—or I should say—did you find, of your own knowledge, that any one aboard had removed his gear? A. Yes.

Q. And what person or persons were they?

A. Mr. Tobin's gear was removed.

Q. And who else, if any one?

A. I don't recall who else.

The Court: What day was this, if you know, [116] when you noticed Mr. Tobin's gear removed from the vessel?

Witness: On the morning of the 4th of June.

Q. (By Mr. Crutcher): Did you make any attempts personally to contact Mr. Tobin on the 4th, the 5th, or any preceding day in June?

A. I did through his business agent, Mr. Gehrig.

Q. Well, did you attempt through Gehrig to contact Mr. Tobin? A. Yes.

Q. Were you able to reach Mr. Tobin?

A. No.

Mr. Crutcher: I have no other questions.

The Court: Is there any cross examination of this witness relating to the questions addressed to him concerning the Lower claim set out in the Lower libel?

Mr. Collins: Yes, Your Honor.

May I have this marked?

(Testimony of John Kadlec.)

Clerk: Respondent's Exhibit A-3. Respondent's Exhibit A-4.

(Photograph marked Respondent's Exhibit A-3 for identification.) [117]

(Photograph marked Respondent's Exhibit A-4 for identification.)

Cross Examination

Q. (By Mr. Collins): You have before you, Mr. Kadlec, Respondent's Exhibits A-3 and A-4, which purport to be pictures of the Silver Spray. Do you recognize them? A. Yes.

Q. Is that the vessel you were on?

A. Yes.

Mr. Collins: I will offer them in evidence.

Mr. Crutcher: No objection.

The Court: Each of them is admitted.

(Respondent's Exhibit A-3 received in evidence.)

(Respondent's Exhibit A-4 received in evidence.)

Q. (By Mr. Collins): You said you were familiar with the supplies and gear aboard the vessel, is that right? A. Yes.

Q. Did you examine the fishing gear? [118]

A. No.

Q. Was there any gear aboard?

A. There was some; I wouldn't recall how much.

* * * * * [119]

Q. What gear of Tobin's was taken off the vessel when it got to Seattle?

(Testimony of John Kadlec.)

The Court: Do you mean his wearing apparel or something else beside wearing apparel?

A. Well, a radio and his sleeping bag and his personal belongings. [120]

* * * * *

Q. How much of Tobin's clothing was taken off?

A. There was none of Mr. Tobin's personal belongings left on board.

Q. When did you first meet Mr. Tobin?

A. About approximately April 12 of this year.

* * * * * [122]

Q. Now, on what date was that?

A. On April 13th.

* * * * *

Q. What did you talk about?

A. After his nephew left, we talked about this fishing venture, and I told him that I was not an experienced fisherman. I had never fished commercially in my life; that it was something I had always wanted to do; and he says: "Well, you don't need no experience in [124] this. We will teach you all you need to know." Therefore, I only had \$500.00 in cash, and the share was for \$1500.00, and as I was going to leave—I wanted to check with my wife first on it——

Q. I don't want to interrupt you, Mr. Kadlec. I want the whole story, and so does the Court, but were you not discussing the Sockeye at this time, another vessel? A. Yes.

Q. Now, please proceed then.

A. Then Mr. Tobin showed me a picture of the

(Testimony of John Kadlec.)

Silver Spray. He said: "I am planning on purchasing this boat." And he was telling me all about what a good boat—and he said: "If I decide to put you on this boat, that is where you will be," he said, "because you only have \$500.00 in this, and I want to put you wherever you are needed."

* * * * * [125]

Q. What did you talk about on the 14th?

A. That is when he took my \$500.00 and signed the contract, and that was all.

Q. You are still talking about the Sockeye?

A. Yes.

* * * * *

Q. Well, excuse me. On the morning of the 14th you gave him \$500.00, and you signed a contract on the Sockeye, and that was the entire conversation at that time?

A. Mr. Tobin also told me that if he decided to put me on this Silver Spray, which he showed me a picture of, that I would work for \$100.00 a week.

* * * * * [126]

Q. Did you tell anybody else on board that you were supposed to get \$100.00 a week?

A. No.

Q. Did any one ask you if you were getting \$100.00 a week? A. No.

Q. You knew the engineer was on a salary?

A. Yes.

Q. And you knew that Capt. Moore was on a salary? A. Yes.

Q. And also the cook?

(Testimony of John Kadlec.)

A. I did not know that. [132]

* * * * *

Q. Were you on board when Tobin left the vessel at Ketchikan? A. Yes.

Q. Do you know why he left the vessel?

A. No.

Q. You discussed it among yourselves that Tobin should go back to Seattle on ship's business, did you not? A. No.

Q. There was no talk at all?

A. None.

Q. Weren't you interested in why he left the vessel?

A. We were very much interested, sir, but that was beside the point.

Q. Beside what point?

A. Beside the point that he left and told the skipper that he ditched us there. [133]

* * * * *

(At 12:00 o'clock p.m., Wednesday, September 15, 1954, proceedings recessed until 2:00 o'clock p.m., Wednesday, September 15, 1954.)

Seattle, Wash., Sept. 15, 1954, 2:00 o'clock p.m.

* * * * * [137]

Mr. Collins: I believe all parties have stipulated and will agree that the contracts of Bunker, Peecher, Herning and Barquist may be introduced in evidence.

The Court: They may be marked respectively Respondents' Exhibits A-5, A-6, A-7 and A-8.

(Contract (Herning) marked Respondents' Exhibit A-5 for identification.)

(Contract (Peecher) marked Respondents' Exhibit A-6 for identification.)

(Contract (Barquist) marked Respondents' Exhibit A-7 for identification.)

(Contract (Bunker) marked Respondents' Exhibit A-8 for identification.) [143]

* * * * *

Mr. Wells: It was only with reference to these exhibits. I exhibited this check to Mr. Collins in the attorney's room and I understood there would be no objection to it. I show it to him now and ask that it be admitted in evidence.

The Court: As whose exhibit?

Mr. Wells: Intervening libellant Norman Bunker.

Mr. Collins: No objection.

The Court: Let the record show it is on behalf of Bunker.

Clerk: It will be Libelants' Exhibit 2. [144]

(Check marked Libelants' Exhibit 2 for identification.)

The Court: Then I understand counsel have no objection to the admission in evidence of Respondents' A-5, A-6, A-7 and A-8, being those blue contract forms which have been mentioned by Mr. Collins? Each of them is admitted accordingly.

(Respondents' Exhibit A-5 received in evidence.)

(Respondents' Exhibit A-6 received in evidence.)

(Respondents' Exhibit A-7 received in evidence.)

(Respondents' Exhibit A-8 received in evidence.) [145]

* * * * *

The Court: Libelants' Exhibit 2 is now admitted.

(Libelants' Exhibit 2 received in evidence.)

* * * * * [146]

Mr. Crutcher: The libelants Lower temporarily rest their case in chief.

Mr. Carey: Just for the purpose of the record, Your Honor, at this time I move to dismiss the libel so far as the libelant Lower is concerned for the reason that his uncontradicted testimony, as well as that of his wife, shows [147] conclusively and without any contradiction whatever that this is an action for fraud, not within the jurisdiction of an admiralty court.

The Court: The Court has considered the authorities cited yesterday further and also has considered some other authorities. The Court does now definitely deny the motion and overrules the objections.

You may have the witness sworn.

GEORGE S. HERNING

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Allison): Your correct name is George S. Herning, is it not? A. Yes.

Q. Where do you reside?

A. 738 North 74th, Seattle, Washington.

Q. And you are married, Mr. Herning?

A. Yes. [148]

Q. Do you have a family?

A. I have two children.

Q. Now, Mr. Herning, were you born in Alaska?

A. Yes.

Q. You spent some time in your youth in Alaska? A. Spent all of my youth.

Q. How many years did you live in Alaska?

A. 41 years.

Q. Now, as a resident of Alaska, have you had any occasion to be acquainted with the fishing industry?

A. Yes. I was raised in a fishing village on the coast.

Q. And does your experience, Mr. Herning, relate to any specific experience as a fisherman while you lived in Alaska?

A. Yes. I have set net, drift netted, and fished out in the ocean on the boats, power boats.

Q. Have you had any experience in your fishing experience with diesel engines?

A. A certain amount, yes. [149]

(Testimony of George S. Herning.)

Q. Now, I believe, Mr. Herning, you testified your fishing experience had been limited to salmon fishing in Alaska? A. That is right.

Q. You had never been tuna fishing before?

A. No.

Q. Now, how did you become acquainted with the respondent Robert Tobin?

A. I seen an ad in the Seattle P.I.

Q. Do you recall when that was?

A. It was somewhere around about the 20th, I believe, of April.

Q. 1954? A. Yes.

Q. Do you recall the contents of that ad?

A. It stated, I believe, "share for sale in tuna clipper sailing for Southern Banks" or something to that effect.

* * * * *

Q. Well, you did subsequently talk to Mr. Tobin? A. Yes.

Q. When did this conversation occur with Mr. Tobin?

A. Well, Mr. Tobin I think the next day called me by phone. [151]

Q. That would be about April 21, 1954?

A. About that time, yes.

Q. Now, did you make an appointment with Mr. Tobin?

A. Yes, I did. I made an appointment, and he asked me to come down to the boat, the Silver Spray. [152]

* * * * *

(Testimony of George S. Herning.)

Q. Did Mr. Tobin explain to you in what respect the vessel would be used?

A. He said that he had a contract lined up with the Van Kamp Cannery at San Diego and the boat would be sailing approximately May 15th for California to go tuna fishing.

Q. Now, did you discuss with Mr. Tobin about tuna equipment aboard the vessel?

A. Not at that time, no.

Q. Well, did you subsequently discuss it with Mr. Tobin?

A. Yes, the next day when I went down again.

Q. That was about April 23rd?

A. About that time, yes.

Q. What conversation did you have with Mr. [153] Tobin concerning tuna equipment aboard the vessel Silver Spray?

A. He said that he had equipment that he purchased with the boat that was stored in a warehouse, and that when he got to California they were going to put on bait tanks and refrigeration in the boat.

Q. Now, Mr. Herning, did you notice any tuna equipment aboard the vessel when you went on board?

A. Well, yes, I noted that the trolling arms—there were two trolling arms on the boat that went up each side of the mast—could be let out, and there was a guard rail on the back of the boat, and in the hold it had storage bins. [154]

* * * * *

(Testimony of George S. Herning.)

Q. And, also, did he discuss refrigeration of the vessel?

A. He said they were going to put refrigeration on the boat.

Q. Now, when did you report aboard the Silver Spray? That is, to begin your employment.

A. I believe it was on a Monday, the 26th.

Q. Monday, the 26th of April, 1954?

A. Yes.

Q. Now, what did you do when you first reported aboard?

A. Well, I went aboard the boat, and Mr. Tobin told me to go down in the engine room and start cleaning up. There was a lot of stuff stored down there, under the bilge it was. There was a lot of things that had fallen down in the oil and water, and underneath the shell there there was a lot of stuff just thrown in, stored, and we started taking that out and putting it out on the deck and separating it.

Q. Now, Mr. Herning, did you confine your work aboard the Silver Spray to the engine room at all times [155] pertinent to this action?

A. At all times and the heating plant.

Q. Now, I understand from previous testimony that the vessel sailed May 17th for Ketchikan?

A. That is right.

Q. Did you so serve aboard the vessel during this voyage?

A. I did.

Q. In the engine room?

A. Yes, sir.

* * * * *

(Testimony of George S. Herning.)

Q. Did you learn during this voyage to Alaska that there were any experienced tuna fishermen aboard [156] the vessel?

A. Yes. There was no tuna fishermen aboard the vessel at all. No man had ever been tuna fishing.

Q. Have you had a previous conversation with Mr. Tobin relative to experienced tuna fishermen aboard?

* * * * *

A. That was one of the questions I asked Mr. Tobin. Was any of the men he had signed up, if they were tuna fishermen? He told me he had two men that had fished tuna. [157]

* * * * *

Q. Were you asked by Mr. Tobin whether or not you would agree to go to Alaska?

A. No.

Q. Is your testimony now, Mr. Herning, that you just went to Alaska with the boat as a crew member, is that correct? [158]

A. That is right.

Q. Now, there has been some testimony about a shakedown cruise to Alaska. The purpose was a shakedown cruise. Now, did you as an engineer aboard the vessel do any work on the engines during this trip to Alaska?

* * * * *

A. The pumps were not working, the bilge pumps, and we took them off and took them up to the Ketchikan Machine Works, and they worked them over and overhauled them.

(Testimony of George S. Herning.)

Q. Now, you came down to Seattle on the Silver Spray? A. That is right.

Q. And you served as engineer on that voyage back to Seattle? A. Yes.

Q. And after the vessel arrived in Seattle, will you tell the Court what you did?

A. We got in here—I believe it was on the Thursday morning—about five o'clock, and I told Capt. Moore that I was going to go home. [159]

Q. For liberty? A. Yes.

Q. Now, at the time you went home was all your gear and personal belongings still aboard the vessel?

A. Everything I had left right on the boat.

Q. Will you continue with your testimony?

A. When I left, I told Capt. Moore that if they wanted me or needed me, to call me at home, if anything came up, and I think it was about between ten and eleven o'clock Thursday morning the phone rang and I answered it, and Mr. Tobin was on the phone, and——

Q. Just a minute. Will you tell the Court what date this telephone conversation occurred with Mr. Tobin?

A. That was Thursday, Thursday morning around about between ten and eleven o'clock.

Q. Would that be Thursday morning, June 3, 1954?

A. Yes. It was the morning we got in port.

Q. June 3, 1954? A. That is right.

Q. Now, will you tell the Court the essence of

(Testimony of George S. Herning.)

this conversation between you and Mr. Tobin on the telephone?

A. Mr. Tobin asked me if I thought that I could handle the engine room alone. [160]

Q. And what did you answer?

A. I told him that I thought I could handle the engine room sufficiently, and he told me that he would contact me later.

* * * * *

Q. And during this conversation did Mr. Tobin mention anything about whether the vessel would sail for Southern waters?

A. No, he didn't not at that time. It was a very short conversation.

Q. Now, since that phone call from Mr. Tobin, have you seen or talked to him prior to this litigation in this Court in the last few days?

A. No. I have not. [161]

Q. Have you tried to locate Mr. Tobin?

A. Yes, I have, at different times.

Q. Have you held yourself out and available to serve aboard the Silver Spray as assistant engineer?

A. I have.

Q. Since the conversation with Mr. Tobin?

A. That is right.

Q. Now, when you last went aboard the vessel, can you tell the Court what the status of the fuel supply was aboard the vessel?

A. Oh, I would say there was in the neighborhood of—the fuel tanks I would say were about half capacity, filled to about half capacity.

(Testimony of George S. Herning.)

Q. What about provisions and stores?

A. Stores were very, very low.

Q. Now, after this phone call, this phone conversation with Mr. Tobin on the morning of June 3rd, did you go back aboard the vessel?

A. I went back that afternoon, I think about one o'clock, and stayed there until nearly four o'clock.

Q. And did you go back on the vessel after that?

* * * * *

A. Oh, yes. I went back every day to the vessel.

* * * * * [162]

Q. When did you finally remove all of your gear from the vessel?

A. I think it was on a Tuesday afternoon following our arrival here.

Q. That would be——

A. Approximately about the 8th, I believe. [163]

* * * * *

Q. Did you ever make a formal demand upon Mr. Tobin for the return of the \$2500.00 that you invested as a working share?

A. No. I never could contact the man.

Q. Was there a period of about a month that you were in Seattle before you became employed with MacPherson Realty?

A. Yes, approximately a month.

Q. What did you do during that month?

A. I didn't do anything. I just was waiting to get some word.

Q. Some word from whom?

A. From Mr. Tobin.

(Testimony of George S. Herning.)

Q. In other words, your testimony is that during this month you held yourself available to continue serving aboard the Silver Spray?

A. That is right. * * * * * [164]

Q. Mr. Herning, the last question which I will ask you now is, as a man who had had previous fishing experience in Alaska, did you consider the Silver Spray equipped for tuna when you went aboard?

A. No, I don't. It was equipped partly, but it had to have bait tanks, and it had to have some kind of refrigeration for tuna fishing.

Q. Now, assuming these two facts, that the bait tanks and refrigeration would be put aboard in California, as Mr. Tobin told you, did you consider the vessel then equipped for tuna fishing?

A. Yes.

Q. Now, you have testified that Mr. Tobin told you he had a contract with Van Kamp's?

A. He said he was lined up with Van Kamp's at San Diego.

Mr. Allison: You may examine. [165]

Cross Examination

Q. (By Mr. Collins): Mr. Herning, how many years have you fished for salmon in Alaska?

A. Oh, off and on, I would say probably five to six years.

Q. What type of fishing?

A. Drift netting, set netting, and trap fishing.

Q. On a lay basis? A. (No answer.)

(Testimony of George S. Herning.)

Q. Do you understand what I mean? Well, I will change the question. On a share basis?

A. On a share basis, yes, sir.

* * * * *

Q. Being on a share basis, you knew that in [166] this Tobin venture you would be paid out of the share of any catch that might have been made?

A. That is right.

Q. And you are well aware of the risks of fishing then? A. That is right.

Q. When you speak of bait tanks on board the Silver Spray, do you know the difference between bait fishing and jig fishing insofar as tuna is concerned?

A. I have never been tuna fishing. I don't know a thing about tuna fishing, sir. I stated that.

Q. Did you see any equipment on board for fishing tuna?

A. No, no gear. The poles were up, and the hold was equipped for ice and storage, and the guard rail was on the back of the boat.

Q. There were lines aboard, were there not?

A. I didn't see any lines. I understand those were stored in the warehouse down at Lake Union; the fishing equipment was there.

* * * * *

Q. Will you tell me the circumstances of Mr. Tobin's departure from Ketchikan to Seattle? [167]

A. I don't know.

* * * * *

(Testimony of George S. Herning.)

Q. When did you first notice Mr. Tobin's absence?

A. I forget. Somebody come on board and said that he had left that afternoon for Seattle by plane.

Q. For what purpose?

A. I don't know what the purpose was for.

Q. Well, weren't you curious as to the purpose?

A. I was in a way, but nobody seemed to know.

Q. Now, in the courtroom we have Capt. Moore, Mr. Tobin, and Mr. Gehrig. Did any of them have a [168] conversation with you as to the purpose for Mr. Tobin's trip to Seattle?

A. I believe one of them did tell me after he had left that he was coming to Seattle to pick up some money.

Q. For the business of the Silver Spray, is that correct?

A. It wasn't stated to me what it was for.

Q. When you came back to Seattle—I understand from your testimony that you arrived June 3 and that seems to be established—you then went home?

A. That is right.

Q. Where is your home?

A. 738 North 74th.

Q. In Seattle? A. Yes.

Q. Prior to that, you had contacted Tobin in Spokane or where?

A. Prior to that?

Q. Prior to June 3?

A. I contacted Mr. Tobin right here in Seattle.

Q. In Seattle?

A. Aboard the Silver Spray.

(Testimony of George S. Herning.)

Q. Did you know his address?

A. In Spokane? [169]

Q. Yes. A. No, sir, I did not.

Q. Did you ever telephone Mr. Tobin or his wife in Spokane? A. No, I did not.

Q. Then on June 3, about ten o'clock, Mr. Tobin telephoned you at your house?

A. That is right.

Q. And asked you if you could handle the engine room? A. That is correct.

Q. For the purpose of proceeding with the venture?

A. He didn't say anything about where we was going or where he figured on going. He just asked me that question—if I thought I could handle the engine room—and I said I thought I could, and he said: "I will contact you later", and he hung up.

Q. Well, your understanding was at that time that you were going to take the boat out some place for some operation?

A. I presumed that it was going to go somewhere, but where I didn't know. [170]

* * * * *

Q. What happened the next day, June 4th, which is a Friday?

A. I went down to the vessel in the morning, stayed down there about, oh, I don't know, two or three hours. Nobody came around so I went back home again.

Q. Wasn't Helwig there on the 4th?

A. Yes, he was.

(Testimony of George S. Herning.)

Q. And who else?

A. I believe Capt. Moore was aboard, too.

Q. Did Capt. Moore tell you that Tobin had to go to Spokane because his little girl was sick? [171]

A. It seems to me like somebody did tell me that, but I don't recall who it was.

Q. Well, please detail the events of Friday, June 4th, as well as you can recall.

A. I was down to the boat for approximately—I would say three or four hours—and there was only two or three men there, and there was nothing doing. We just sat around and talked. So I went home, and I left word with them—I think Mr. Peecher was there—I left word later on during the day if they wanted me or if anything took place, if Mr. Tobin came, why, to contact me at home by phone.

Q. Now, on June 4th, you say some men were there and you sat around and talked. What men were there?

A. Mr. Peecher was there, I believe, and Mr. Barquist.

Q. What did you talk about?

A. Nothing, in general. Just waiting for Mr. Tobin to come.

Q. You knew the boat had to go in drydock?

A. Well, I presume it had. It had struck a log, had propeller trouble.

Q. And you knew there would be some delay for three or four days before any operation could be put into effect, didn't you? [172]

(Testimony of George S. Herning.)

A. Yes, that is right. [173]

* * * * *

Q. Now, then, Mr. Herning, when, where, and under what circumstances and who was present, if any one was present, did Tobin fire you?

* * * * *

A. Tobin, he never fired me.

Q. When did you decide to try to get your \$2500.00 back? [175]

* * * * *

A. It was approximately I would say about two weeks after we arrived in port. Mr. Gehrig told me that Mr. Tobin had a lawyer. I believe his name was Swontkoski, and I called up Mr. Swontkoski on the phone.

* * * * *

Q. Well, please proceed, sir.

A. (Continued) I asked Mr. Swontkoski where I could get in touch with Mr. Tobin, and he asked me what I wanted, and I told him that I understood the vessel had been attached and that I would like to get in contact with Mr. Tobin to find out what he was going to do. He [176] told me over the phone—he said: “I will notify you within two or three days what is going to take place.” About the third or fourth day after that conversation I received a letter from Mr. Swontkoski by registered mail stating—I can’t say word for word—but stating that Mr. Tobin was going to take care of the shareholders and the money that they had invested in the boat. [177] * * * * *

(Testimony of George S. Herning.)

Q. Did you understand the share agreement which you signed? A. Yes.

Q. Did you read it? A. Yes.

Q. You understood that in the event Mr. Tobin should release you that he would have ninety days to pay your money back?

A. That is right.

Q. You also understood that if you wanted to leave the vessel you were to give him thirty days' notice? A. That is right.

Q. Did you do so?

A. I gave his lawyer the notice when I called him up over the phone.

Q. Was that thirty days?

A. It was approximately two weeks after we arrived in Seattle. [178]

Q. Now, the fact is, Mr. Herning, that you did not give Mr. Tobin any time within the contract you signed to keep that vessel in operation, sell your share, and pay you the money back, did you?

A. I couldn't get in touch with Mr. Tobin at all. I waited for two months trying to get some word from the man.

Mr. Collins: I have no further questions.

Cross Examination

Q. (By Mr. Carey): In order that I may be sure of the dates so far as it affects my clients, you went aboard the vessel here in Seattle on April 26, 1954? A. That is correct.

(Testimony of George S. Herning.)

Q. From April 26 to May 17th you were doing work on her here in port?

A. That is right.

Q. Here in Seattle? A. That is right.

Q. Then on May 17 you started on this trip to Alaska? A. That is correct.

Q. And during that time you were doing engine room work? [179] A. That is right.

Q. And you arrived back in Seattle then on the morning of June 3rd?

A. That is correct.

* * * * *

Q. You had no separate agreement with him concerning any wages for this trip to Alaska and back? A. No.

Q. Do you recall, Mr. Herning, the date on which you put up the \$2500.00? [180]

* * * * *

A. It was the day that I signed the contract. I give him the check.

Q. Well, that answers it then. Is it your claim, Mr. Herning, that you put up this \$2500.00 because Mr. Tobin misrepresented to you about this proposed trip and the availability of the boat for tuna fishing? A. That is right.

Q. And what you are really complaining about is that he did misrepresent to you, got \$2500.00 from you, and you want to get that back, is that it?

A. Well, I want to get back what I figure I [181] having coming.

Q. And that is the \$2500.00 you put up?

(Testimony of George S. Herning.)

A. That is right.

Mr. Carey: That is all.

Redirect Examination

Q. (By Mr. Allison): Mr. Herning, did Mr. Tobin make any representation to you during the time you discussed this contract about the earnings you might expect to earn from the fishing season?

A. I believe that was discussed, and it was said some of the boats made as high as \$5,000.00 in just the fall fishing alone, \$5,000.00 per man.

Q. Based on that conversation with Mr. Tobin you bought into this fishing share arrangement, is that correct? A. That is right. [182]

* * * * *

Q. Mr. Herning, when did this conversation with Mr. Tobin about the anticipated earnings occur?

A. That was the first day I talked to him on the boat.

Q. That was the day that he told you that some vessel earned so much money and other vessels earned a different amount, is that correct?

A. That is right. [183]

Mr. Allison: I think that is all.

Recross Examination

Q. (By Mr. Carey): Mr. Herning, in view of your experience in fishing in Alaska, you know that nobody can predict three, four or five months in advance what the run of any fish will be, don't you?

A. That is right.

(Testimony of George S. Herning.)

Q. And that would apply to tuna as well as salmon? A. That is right.

Q. So this opinion of Tobin was just a hope, not a guarantee?

A. It was based on what the boats that had been there the previous fall had made.

Q. You knew it was what he hoped to do, that is all? A. It could be.

Mr. Carey: Yes.

Mr. Allison: That is all.

Mr. Collins: No questions.

The Court: Step down.

(Witness excused.) [184]

* * * * *

Mr. Armstrong: If the Court please, I would like to Call Mr. Peecher at this time.

EDGAR L. PEECHER

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Armstrong): Your name is Edgar L. Peecher? A. That is right.

Q. And where do you reside, Mr. Peecher?

A. 8015 S.W. 45th Street, Portland, Oregon.

Q. How long have you lived in Portland, Oregon? A. Oh, about thirty years. [185]

* * * * *

Q. Had you ever had prior to April 1954 any experience as a commercial fisherman?

(Testimony of Edgar L. Peecher.)

A. None whatsoever.

Q. Were you familiar with vessels prior to April of 1954?

A. Well, I had longshored for ten years. I had been on many, many boats, not necessarily fishing boats.

Q. How did you come in contact with Mr. Tobin?

A. I saw an ad in the Seattle P.I. It said: "Commercial fishing, tuna clipper, leaving for Southern waters."

Q. Do you know approximately when you saw that?

A. It was sometime the latter part of April.

Q. What did you do with regard to the ad?

A. I wrote a letter and inquired.

Q. Did you get a response to your inquiry?

A. I got a telegram, yes. [186]

Q. Who did you receive that telegram from?

A. I received the telegram from a man by the name of Flagler.

* * * * *

Q. Did you discuss with Mr. Flagler anything about the vessel Silver Spray?

A. Yes, I talked with him about it, and he said that the man that owned the boat had just left to go to the boat, and he told me where the boat was at, and if I wanted to talk to Mr. Tobin about the project that I should go down to the boat tied up at Pacific Fishing & Trading Company.

Q. Did you do that? [187]

A. After I had my dinner, I did that, yes.

(Testimony of Edgar L. Peecher.)

Q. Do you know what day that was on?

A. It was the latter part of April. I don't recall the exact date.

Q. You did go to the vessel you have said. Who did you see on the vessel?

A. I saw Mr. Tobin.

* * * * *

Q. Will you relate, as closely as you can remember, the conversation that took place between you and Mr. Tobin on that occasion?

Q. I inquired into what the venture was going to [188] be, what their plans were as to what they were going to do with the boat. They said they were going to San Diego on tuna fishing and——

Q. Did he tell you whether or not he had a contract to fish in San Diego?

A. Yes. He told me that the ship was **contracted** to Van Kamp's Cannery, that they would get bait tanks and refrigeration at San Diego. It was supposed to leave no later than May 15th, and was supposed to be in San Diego at Van Kamp's Cannery no later than June 1st. The ship was contracted to Van Kamp's Cannery.

Q. Did you discuss with Mr. Tobin on that occasion anything with regard to who or what the experience of other crew members was?

A. Yes, definitely.

Q. What did you have to say to him or he have to say to you about the experience of other men on board the vessel?

A. The first thing I told him was that I had had

(Testimony of Edgar L. Peecher.)

no fishing experience myself, but I asked if he had any experienced men in the crew. He said he had two experienced San Diego fishermen. They weren't aboard the boat and wouldn't be aboard the boat until we got to San Diego. They both had very important jobs in Seattle, and after we got to San Diego they would quit their jobs and [189] fly down so that they could stay on their jobs here as long as possible. He also told me that a man by the name of Jim Gehrig was going to navigate the boat down to San Diego for us as a courtesy, and then he would in turn fly back, that he was not going to go fishing.

Q. Did he tell you who was going to be the skipper or captain of the boat?

A. He was the captain or skipper.

Q. Did he say anything about the prospective earnings or earnings which you could expect to make on this venture?

A. Yes, sir.

Q. What did he say?

A. From \$5,000.00 up.

Q. Did you inquire as to the gear that was on board the vessel?

A. Yes, I did.

Q. To what extent did you inquire?

A. Mr. Tobin took me over the ship. I formed the opinion, my own opinion, that the ship was sound, but not knowing what was required for tuna fishing other than the bait tank, I didn't know whether there was sufficient fishing gear on there or not. I did see that they had two fishing arms, one on each side of the boat. They were up. But there

(Testimony of Edgar L. Peecher.)

was no other gear to my knowledge on the ship.

* * * * * [190]

Q. And did you pay him any money for a working share in the vessel?

A. At that time, when I agreed to take the share, I gave him \$20.00, all the money I had in my pocket, to show my earnestness in it, and then in a day or two I had a check sent from Portland and handed the check to him in full.

Q. In what amount of money?

A. \$2500.00.

Q. Did you go on board the boat during April?

A. I didn't go to stay.

Q. When did you first go to work on the boat?

A. I even went to work on the boat before we signed the contract. I quit my job at Pacific Car & Foundry and come down and helped them paint and make ready.

Q. You signed your contract on May 4th, so you mean some time prior to that? [191]

A. Sometime prior to that, yes, I worked on board the ship.

Q. How long did you continue to work on board the vessel prior to the time it departed for Ketchikan, Alaska?

A. I worked right up all the time.

Q. Were you on board the vessel every day?

A. Every day.

* * * * *

Q. What was your understanding with Mr.

(Testimony of Edgar L. Peecher.)

Tobin as to what you were to do after you signed the contract?

A. I told Mr. Tobin that I had formerly been a longshoreman; that I didn't know anything about the navigation of a boat; but I did know about stowing cargo and taking care of the ship's gear, and such as that. So I was told by Mr. Tobin that that would be my job, to take care of the hold and any cargo that should be put in.

Q. Where were you to go and for how long were [192] you to be employed?

A. We were supposed to go to San Diego on a tuna fishing trip, and to the best of my knowledge it was from now on.

Q. You mean from then on?

A. From then on, yes. There was no set period of how long we would be on the trip.

Q. Were you going to stay there for the full 1954 tuna fishing season?

A. Yes, sir.

* * * * *

Q. What was said by you or by Mr. Tobin to you with regard to the departure of the vessel for Ketchikan from Seattle?

A. He come aboard the ship one afternoon about, [193] oh, somewhere between 2:00 and 4:00, and said: "We are going to Alaska in the morning." That was all the consultation that was held with me.

Q. Were you given any opportunity at all to or permitted to express your opinion as to whether or not you desired to go to Ketchikan?

(Testimony of Edgar L. Peecher.)

A. None.

* * * * *

Q. Did you say anything to Mr. Tobin about going to Alaska? A. I did.

Q. What did you say?

A. I told Mr. Tobin that I, as one individual, didn't care to go to Alaska; that that wasn't what I come aboard the ship for; I come aboard the ship to go to San Diego on a tuna fishing trip.

Q. What did he say?

A. Well, he said: "Why take a chance on tuna fishing when you can go to Alaska and make all this money? There is going to be a lot of money made by the ship, and all these men have to have wages coming in"—he had ten [194] men aboard—"they have families to worry about making a living for"—and he couldn't let one man interrupt that.

Q. Did you have any choice as to whether or not you could go to Alaska?

A. I had no choice.

Q. You did go to Alaska?

A. I did go to Alaska.

Q. When did you leave the vessel?

A. Some time after the vessel came back from Wrangell to Ketchikan.

Q. Under what circumstances did you leave the vessel?

A. After we got to Alaska we run into very severe weather from my standpoint.

(Testimony of Edgar L. Peecher.)

Q. Will you explain what you mean by "your standpoint"?

A. I am subject to arthritis, and the weather was very damp, moist, cold up there, and it didn't agree with my health at all. I began to swell up in my hands and my ankles, my knees, so I could see there was only one thing for me to do was to get out of Alaska.

Q. So what did you do in that regard?

A. I asked Mr. Tobin if I could come back to Seattle and get out of it. [195]

Q. Now, at that time, did you ask Mr. Tobin whether you could be completely released from the vessel or what was the subject of your conversation?

A. Mr. Tobin took one look at me and he said: "I realize that you have no business up here." So he said: "I am not going to try to hold you here in any way." He said: "I am going back to Seattle today by plane, and if you want me to, I will get two tickets while I am at it, and we will both go together." And I said: "That is all right with me. Get the tickets." He asked me if I had the money to pay my own way, and I told him I did. I paid my own way.

Q. Was anything said about your rejoining the vessel when it returned to Seattle?

A. To my knowledge there wasn't.

Q. You mean there was nothing said?

A. No.

(Testimony of Edgar L. Peecher.)

Q. Well, were you leaving the vessel permanently when you left it in Alaska?

A. If the vessel was going to stay in Alaska, I would have left it permanently, yes.

Q. But had the vessel gone to California tuna fishing, what would you have done?

A. I would have gladly went along.

Q. As a matter of fact, you did come back to the [196] vessel when it arrived in Seattle with the intention of going on board and going to California, did you not?

A. That is right. * * * * * [197]

Q. When you talked with Mr. Tobin in Ketchikan on your return, did he say anything at all with regard to what he intended to do with this vessel, the Silver Spray?

A. At that time he said he was going to keep it there and open a lodge. They were going to use the vessel to take their prospective clients back and forth from the lodge to the airport or whatever it was necessary to use the boat for; that he had planned that for many, many months and he intended to keep it there.

Q. He advised you at that time then that he did not intend to go on this tuna fishing venture? [198]

A. That was the understanding that I had, yes.
* * * * *

Q. When did you board the vessel, Mr. Peecher?

A. In Seattle? I boarded the vessel on June 4.
* * * * *

Q. Was Mr. Tobin on board on the 4th?

(Testimony of Edgar L. Peecher.)

A. No, sir.

Q. Did you have occasion to observe whether or not his gear was on board the vessel when you went on board on the 4th of June?

A. Yes, I did. [199]

Q. Was the gear there or not?

A. No, it wasn't. [200]

* * * * *

Q. How long did you stay around the vessel or keep returning to the vessel, Mr. Peecher?

A. Several days.

* * * * *

Q. Did Mr. Tobin come on board the vessel during any of those days or contact the vessel to your knowledge? [201]

A. Not for several days he didn't.

* * * * *

Q. Were you present when he came on board on the evening of the 7th? A. Yes, I was.

Q. What conversation took place between Mr. Tobin and the crew members on board?

A. Well, Mr. Tobin walked into the galley of the ship. All of us were sitting in the galley. And he said that any one that was interested in the procedure to come and go with him to his lawyer's office.

Q. About what time of the evening was that?

A. I would say somewhere after 7:00 o'clock.

Q. In the evening? A. In the evening.

Q. What further was said in your presence on his boarding the vessel on that occasion?

A. There was two or three different ones that

(Testimony of Edgar L. Peecher.)

[202] asked him what he was going to do, what they were going to do, or what the general opinion was, and the only answer that I heard him give was that they was to go see his lawyer and it would all be thrashed out there, and that he had the money waiting there for any of those that wanted their money out of the venture.

Q. Did you go with him to see his lawyer?

A. No, I didn't.

* * * * *

Q. Did Mr. Tobin on the 7th of June say anything about his intentions to fish for tuna?

A. He never said anything then but I had received a letter from Mr. Tobin at my home in Portland after I come [203] back from Ketchikan telling me that the vessel was coming back, that they were going to San Diego fishing, and wanted to know if I wanted to continue on the voyage.

Q. Did he say anything about that letter when you talked to him on the 7th?

A. No. He never did.

Q. Was there any mention at all of the vessel departing for San Diego or for fishing for tuna?

A. Not that day, no.

* * * * *

Q. Which one of these persons said anything to [204] you about the plans of the vessel?

A. Jim Gehrig.

Q. Did you ever have any discussions with Mr. Tobin with regard to what relation Jim Gehrig had to the vessel Silver Spray or to Mr. Tobin?

(Testimony of Edgar L. Peecher.)

A. I was told by Mr. Tobin that Mr. Jim Gehrig was his business agent.

Q. Is it a fact or is it not a fact that the ad which you answered claimed and stated in it that Mr. Gehrig was the business agent?

A. That is right.

Q. I will now ask you the question what did Mr. Gehrig tell you about the plans of the Silver Spray?

A. Well, the statement that Mr. Gehrig made after the vessel came back from Ketchikan was that there could be something salvaged out of the whole venture then if we all got together and formed a company or some such thing and tried to remove Mr. Tobin from it, because he had felt like, as far as Mr. Tobin was concerned, he was all through with the venture. That was his idea. So there was talk of hauling apples back to Alaska or hauling knock-down defense homes or different things were brought up in different subjects and different conversations, but nothing concrete come out of any of it.

Mr. Armstrong: I have no further questions.

Cross Examination

Q. (By Mr. Collins): Mr. Peecher, when you left the boat in Ketchikan, you did so of your own free will?

A. That is right, with the consent of Mr. Tobin.

Q. You rode back on the plane with Tobin?

A. That is right. * * * * *

(Testimony of Edgar L. Peecher.)

Q. You knew he was coming down on Silver Spray business? A. No. I did not.

Q. What was he coming down for?

A. The only reason he gave me for coming to Seattle and going on to Spokane was that a man had to see his family once in a while.

Q. Didn't you know anything about the arrangement with Shell Fish, Incorporated?

A. Only hearsay.

Q. I will waive the hearsay rule if you will tell me what you know about it. [206]

A. I heard that we were supposed to have a load of fish at Wrangell to haul down for Shell Fish, Incorporated, I believe it was.

Q. You went to a port in Alaska to pick up shell fish? A. That is right.

Q. And there wasn't a cargo?

A. That is right.

Q. And Mr. Tobin went down to Seattle to straight out the arrangement?

A. Mr. Tobin didn't stop in Seattle other than to change planes, the same as I did. He went to Spokane, and I went to Portland.

* * * * *

Q. You were willing to leave the ship entirely at Ketchikan?

A. As long as it was going to stay in Alaska, yes.

Q. And you were willing to sell your share back to Tobin? [207]

A. If the vessel was going to stay in Alaska, I

(Testimony of Edgar L. Peecher.)

wanted no more to do with it, because I couldn't stay there on account of my health.

Q. Didn't he offer to pay you for your share?

A. No. He never did.

Q. Did he offer to try to sell another share and pay you your money back?

A. Yes, he offered that.

Q. You signed one of these general contracts, did you not? A. I did.

Q. And he offered to comply with the terms of that contract?

A. He offered at that time, yes.

Q. Now, you mentioned this hunting lodge. Didn't you and Tobin discuss many enterprises, including the hunting lodge, maybe fishing off Honolulu, off San Diego, maybe carrying freight to Alaska, and using two or more different boats in all these ventures?

A. I could answer that question by telling you this—that every time I heard Mr. Tobin talking about anything after I signed my contract, it was a different proposition every time.

Q. They were all business suggestions, in other words? [208]

A. I would suppose they would be.

Q. And you were willing to be convinced as to the plausibility of any of them, were you not?

A. No, sir.

Q. Well, at least you were interested in working with him up to the time that the venture folded?

A. My primary reason for going aboard the ship

(Testimony of Edgar L. Peecher.)

was to go tuna fishing off San Diego. If I had known that the vessel was going North of Seattle, I would have never went into the venture. I told him the only reason I wanted to go on it was because it was going South, where it was warm, where I would feel good. Mr. Tobin or nobody else can say that is not true because it is true. There was nothing ever said to me about going to Alaska or anywhere else other than San Diego until after I had my \$2500.00 in it. [209]

* * * * *

The Court: Will there be considerable more cross examination?

Mr. Collins: Yes, Your Honor.

The Court: Then I think we ought to suspend. Court is adjourned until tomorrow morning at ten o'clock. The witnesses are requested to be back again tomorrow unless the Court has otherwise directed.

(At 4:35 o'clock p.m., on Wednesday, September 15, 1954, proceedings recessed until 10:00 o'clock a.m., Thursday, September 16, 1954.) [210]

Seattle, Wash., Sept. 16, 1954, 10:00 o'clock a.m.

The Court: You may proceed with the case on trial. [211]

* * * * *

Q. (By Mr. Collins): When and where did Mr. Tobin discharge you?

A. I would say that he did when he abandoned the ship in Seattle. * * * * *

(Testimony of Edgar L. Peecher.)

Q. I believe you testified yesterday that from the time you and Mr. Tobin left the vessel in Ketchikan you had no further conversation about tuna fishing? [213]

* * * * *

A. No. I didn't say that.

Q. What did you say?

A. I said on the plane trip, while we was on the plane.

Mr. Collins: May I offer a document?

The Court: It will be marked.

The Clerk: Respondents' Exhibit A-9.

(Letters marked Respondents' Exhibit A-9 for identification.)

* * * * *

Q. (By Mr. Collins): You have been handed Respondents' A-9. There are two documents there, one a typewritten letter from Tobin to you and your reply to Mr. Tobin. Do you recall those documents? A. Yes, I do.

Q. Both of them? A. Yes, I do.

Mr. Collins: I will offer A-9, Your Honor. [214]

Mr. Armstrong: No objection.

The Court: Respondents' Exhibit A-9 is now admitted.

(Respondents' Exhibit A-9 received in evidence.)

* * * * *

Q. (By Mr. Collins): Now, as I have your notes here, you testified that as of June 3rd and for sev-

(Testimony of Edgar L. Peecher.)

eral days thereafter you planned to go tuna fishing with Mr. Tobin?

A. After I come back up to Seattle, yes.

Q. Well, did you change your mind after that letter? A. I did.

The Court: What was the date of your first return to Seattle after writing that letter?

Witness: June 4th. [215]

Q. (By Mr. Collins): As of May 29, you wanted your money back?

A. I would have taken it then, yes.

Q. Well, you wanted it back, did you not?

A. I would have accepted my money, yes.

Q. Did you make demand on Mr. Tobin at any time after May 29th for your money?

A. Yes. When I was told that he abandoned the ship, I asked him the first time I see him.

Q. Well, who told you that?

A. The balance of the crew that was on board ship.

Q. Well, name them, please.

A. Well, Harry Lower——

Q. Did Mr. Lower tell you that he talked to Tobin at the hotel, the Edmond Meany, on June 3rd?

A. I didn't see Mr. Lower on June 3rd. [216]

* * * * *

Q. Tobin came down to the boat and tried to get aboard, did he not?

A. Tobin came down to the boat on the evening

(Testimony of Edgar L. Peecher.)

of the 7th and got aboard, came right in the galley and talked.

Q. And you threatened him with physical violence, is that right? A. (Laughs.)

Q. I don't think it is funny, Mr. Peecher. Did you or did you not threaten him with physical violence?

A. Why, I might have threatened to punch him in the nose—might like to do it now.

Q. And who else wanted to punch him in the nose? A. No one to my knowledge.

Q. And then you, in harmony with these other men, put him back on the dock?

A. He went on the dock of his own free will. That is when he asked us all to go up to his attorney's office with him. He said everything would be straightened up at his attorney's. [218]

* * * * *

Q. Mr. Tobin suggested to you gentlemen that you see his lawyer and give him time to sell shares in the boat to other people so you men could be paid off, did he not? [219]

* * * * *

A. Yes.

* * * * *

Q. When did you first hear about this libel on the Silver Spray?

A. I first heard of Mr. Lower's contemplated [220] action on Saturday.

Q. That would be June 5th? * * * * *

Mr. Collins: I will terminate the examination.

(Testimony of Edgar L. Peecher.)

Cross Examination

* * * * [221]

Q. (By Mr. Carey): Your sole interest in the venture, as I understand, was to participate in this tuna fishing? A. That is right.

Q. You were not at all interested in the Alaska operation? A. Absolutely not.

Q. You had no contract to participate in that?

A. The contract called for tuna fishing in Southern waters.

Q. Yes, and that is the only contract you were interested in? A. That is right.

Q. You went to Alaska simply because the boat was [224] going there? A. That is right.

Q. And you went aboard pending the time it might come back and start to California waters for tuna fishing? A. That is right.

Q. Now, in answer just a few moments ago to a question asked you by Mr. Collins with reference to the occurrences on June 7, you said that on that date it was your disposition to punch Mr. Tobin in the nose. Why was it that you felt inclined to punch him in the nose? Was it because you felt that he had defrauded you?

A. I had already made up my own mind that I couldn't believe a word the man said.

Q. Well, did you think he had defrauded you in getting you into this deal? Was that it?

A. I certainly did.

Mr. Carey: That is all.

The Court: Any further questions of this witness?

Mr. Armstrong: No.

The Court: Step down.

(Witness excused.) [225]

* * * * *

HERVEY PETRICH

called as a witness by and on behalf of libellant Harry C. Lower, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Will you state your full name? A. Hervey Petrich.

Q. Where do you live Mr. Petrich?

A. I live at 3424 North 19th in Tacoma, Washington.

Q. What is your occupation?

A. I am affiliated with the Western Boatbuilding Company in Tacoma who build vessels, mainly fishing vessels, and my particular operation is to take care of the fishing boats in our fishing fleet owned by this company.

Q. Do you have a title as to that?

A. Nothing more than we are five brothers together, and we are all partners, and we don't give anybody any title over the others. [226]

Q. How long have you been connected with fishing vessels and fishing in general?

A. Oh, I have been with the company all my life. I would say in this particular operation actively engaged for 25 years.

(Testimony of Hervey Petrich.)

Q. During that time have you had any connection with the tuna fishing industry?

A. I have, yes.

Q. Does your company build tuna vessels?

A. Yes, we do.

Q. Does your company own any tuna fishing vessels? A. Yes, we do.

Q. Do you operate any tuna fishing vessels?

A. Yes. We are managing and owners of five tuna clippers and five purse seiners.

Q. In connection with that sort of work, have you had occasion to work in Southern California, particularly San Diego or in the Los Angeles area in connection with the tuna industry?

A. My work keeps me in Southern California most of the year.

Q. How long have you been doing that sort of work in Southern California?

A. Well, the active part has been most prominent since the end of World War II. [227]

Q. Would it be since 1946?

A. Since 1946, yes. However, I have been in it previous to the war—in other fields.

Q. I understand. Now, in connection with your work, do you have occasion to know about the catches of tuna and the prices paid for tuna in Southern California?

Mr. Collins: I object to the question and the answer of this witness upon the ground that it is irrelevant and incompetent insofar as these particular

(Testimony of Hervey Petrich.)

libelants are concerned. I would like to argue that objection.

(Argument.)

The Court: Do you wish your objection to run to all this line of testimony?

Mr. Collins: Yes, Your Honor.

Mr. Crutcher: No objection on my part.

The Court: The Court approves. Therefore, you may proceed but be certain to have in mind that the Court will later examine this, so if there are any aspects of it or objections that you think you might be alerted to by reason of their being stated, it is up to you to be so alerted.

Mr. Crutcher: Thank you, Your Honor. I will withdraw my previous question. [228]

Q. (By Mr. Crutcher): Mr. Petrich, will you tell the Court briefly what a tuna clipper is?

A. The interpretation of a tuna clipper is synonymous with a typical vessel found in Southern California in which they have tanks to carry live bait, and this live bait is thrown into the water, attracts the tuna, and the fishermen with poles and hooks or lures will bring the tuna back into the vessel.

Q. Does such a vessel have any refrigeration?

A. Normally, a large tuna clipper is completely refrigerated.

Q. Now, with reference to the size of tuna clippers, can you, as a boat builder, state the approximate range of size so far as length is concerned of a tuna clipper?

(Testimony of Hervey Petrich.)

A. Well, the vessels that we have been building up North for the Southern trade have been limited to the sizes from 85 feet to 170 feet. However, they do build smaller tuna clippers down as low as 45' and 50'.

Q. In the course of your work which you have described to the Court, do you have occasion to learn of the catches made by the various tuna clippers operating out of San Diego?

A. All records are always available to me. In [229] fact, that is the basis of determining whether a man is capable of running a vessel or not.

Q. Now, can you state to the Court whether there is such a thing as an average catch for tuna clippers of a particular size, that is, year after year?

A. Well, there is usually an average catch which is determined at the end of a season. We cannot determine and predict what the season will hold in the future.

Q. Does that average catch vary from year to year?

A. That average catch does vary, yes.

Q. Are you acquainted with the variations in average from year to year in the course of your work?

A. Yes. We make an estimate of what the average is and see whether a particular vessel is above or below that.

Q. In view of your experience in this field, would you be qualified to estimate the average catch

(Testimony of Hervey Petrich.)

in an average year for a tuna clipper approximately 80' long?

A. Yes. Going back over our records, we can.

Q. Have you had occasion to study your records recently in that respect?

A. I have, yes.

Q. Will you state to the Court what the approximate average catch of an 80' tuna clipper in an average [230] year would be in terms of tonnage?

A. In the average catch of an 80' bait boat or clipper, as you call them, we are assuming that—the carrying capacity is what we base it on, of course—now, you are speaking of 80'—however, that average run of vessel would run between 300 to 500 tons per year.

Q. Now, when you say you are referring to the capacity rather than to overall length, you mean the carrying capacity or the hold space of the vessel?

A. The amount of tuna that vessel can carry.

Q. What is the average carrying space of a tuna clipper approximately 80' over-all length?

A. The average would be between 90 and 120 tons on 80'. They normally have them up to 95', and that brings them up to about 150 tons' capacity.

Q. Now, when you speak of an average capacity of 90 to 120 tons, are you referring to weight or to cubic space?

A. I am referring to weight of the tuna that is unloaded.

(Testimony of Hervey Petrich.)

Q. Does that compare with cubic space? That is the normal cubic space ton of 40 cubic feet?

A. Well, normally, if we take a particular size of tuna, the average runs around 40 cubic feet for one ton.

Q. Forty cubic feet for one ton? [231]

A. That is right. That can vary with the size of the fish and how they pack it. It is just a rule of thumb figure.

Q. Assuming that a vessel had approximately cubic tonnage of 60 to 70 feet then, the catch would be smaller than for the vessel which you have described, would it not?

A. Yes. I would say that vessel would average around the lower levels of around 300 tons for the year, say 250 to 300 tons. These are just estimates, going by past experience.

Q. What type of fish are those?

Q. Yellow fin and skip jack, which is a species of tuna. On the market they are known as light meat tuna.

Q. Is there a fairly established price for yellow fin to the tuna vessel?

A. That is always established before they start.

Q. Does it vary from year to year?

A. Yes.

Q. Over an average period of say the last three years, what is the average price of yellow fin so far as you can recall it?

A. The average price of yellow fin is around \$320.00 a ton. However, we catch so much skip jack,

(Testimony of Hervey Petrich.)

and that is a lower price—\$280.00—so I would say the average for the two species as tuna would be around \$300.00 [232] a ton for the last two to three years.

Q. Do you happen to know what the price is this year?

A. Well, the price this year started out at \$350.00 a ton and a threatened tie-up resulted because they were getting so much tuna and so much tuna was being imported from Japan, that they agreed to reduce the price from \$350.00 on yellow fin to \$330.00. However, the year previous the price was \$320.00. [233]

* * * * *

Q. A moment ago, Mr. Petrich, it was pointed out to me that I inadvertently referred to 70' when I meant to say 70 tons. I was speaking of reduced tonnage capacity and you gave a lower estimate as to the average catch for a vessel of that smaller content. I now call that to your attention and ask you whether your answer would have been the same had I said 70 tons instead of 70'?

A. I was keeping in mind tonnage rather than footage.

Q. Thank you. Has the catch this year been below or above average so far?

A. The run of tuna has been exceptionally good, [234] but the market has been very poor. That is, the canneries, due to this higher price, were unable to accept it, and they would delay the vessels being unloaded, and tell them to lay down and not bring

(Testimony of Hervey Petrich.)

in so much; we can't take it. As a result, I would say the over-all picture is about the same as far as tonnage is concerned.

Q. The same as the average of previous seasons?

A. Yes. [235]

* * * * *

Q. Will the witness advise the Court how the average price this year so far compares with the prices for previous years? [237]

A. The average price this year up to July 27 was higher than it has practically ever been in the industry.

Q. And since that time, how was the price running in comparison with previous years?

A. The price is about the same at the present-time.

Q. Can you advise the Court as to the relative percentage of skip jack and yellow fin brought in in a normal season by an average small clipper?

A. I would say that the skip jack usually is a little more than the yellow fin. Perhaps—I would say it may be a 60-40 ratio. Sixty per cent would be the skip jack and forty per cent would be the yellow fin tuna.

Mr. Crutcher: I have no other questions.

The Court: You may inquire and you may cross examine without waiving your objections to this line of inquiry. Before that, however, we shall have a short recess at this time.

(Recess.) [238]

* * * * *

(Testimony of Hervey Petrich.)

Cross Examination

Q. (By Mr. Carey): The tuna boats that you operate and with which you are familiar in your own operation, I gather from your description they are what are called live bait boats——

A. The ones I have referred to in this court have been on the live bait vessels. However, we do operate purse seiners, also.

Q. Well, that is in the salmon industry, isn't it?

A. That is in the tuna industry, also.

Q. Do they catch tuna with purse seine boats?

A. Yes.

Q. Well, are those the purse seine boats that come down from Alaska to fill in the season or do they build them for tuna fishing?

A. They are strictly vessels that are used in Southern California for tuna, but they did come from this part of the country.

Q. Now, the vessels that you have been speaking about are vessels that are built as tuna clippers for live bait fishing?

A. Of the five vessels we have in the bait fishing game, four of them were built as that, and one of them was a converted Navy tug. [239]

* * * * *

Q. Have you ever seen this Silver Spray?

A. No, sir. I haven't.

Q. You don't know what its capacity is or suitability for catching tuna?

A. I have never seen it.

(Testimony of Hervey Petrich.)

The Court: Give him the length. The length has been previously mentioned.

Mr. Carey: It will take me a moment——

The Court: It has been stated as 80', and here is a photograph of it.

(Photograph handed to witness.)

Witness: This vessel is no bait boat. This is a jig boat or trolling boat. Well, we are or [243] have been talking about bait boats.

Q. (By Mr. Carey): What you have been testifying about throughout were the regular tuna schooners built for the tuna service and you haven't been talking about jig fishing at all?

A. No.

The Court: Well, do you know what the tuna cargo capacity of this vessel is, this vessel as you see it reflected in that exhibit?

Witness: I could never tell how much that carried until I went in and looked at the hold and saw how big it was.

Mr. Crutcher: On that one point we will produce evidence of the approximate——

Mr. Carey: I prefer that my cross examination not be interrupted, Your Honor.

Q. (By Mr. Carey): Now, you are asked about average catches during different years. The average may be of use for statistical purposes after the season is over, but the average for last year would be of no use at all as a prediction of what will be done this year, would it?

A. Well, the year has proceeded far enough for

(Testimony of Hervey Petrich.)

me to determine that this year is as good as last year.

Q. About an average year? [244]

A. Yes.

Q. But all the evidence you have given on that subject contemplates a live bait boat of large capacity with a large crew of experienced men?

* * * * *

A. My testimony has been on the basis of a bait boat.

Q. Has no relation to a jig boat such as the photograph discloses? A. No, sir.

Mr. Carey: That is all.

The Court: Anything further?

Mr. Crutcher: Yes, Your Honor.

Redirect Examination

* * * * * [245]

Q. (By Mr. Crutcher): Was your testimony concerning tuna clippers of approximately 80' in length, the testimony referring to averages, directed to bait boats of approximately 80' in length?

A. Yes.

Q. You referred in your testimony for Mr. Carey to a jig boat, did you not?

The Court: He did at one time when he was talking about that picture that was shown him, which is an exhibit in the case.

Q. Is there a difference between a jig boat and [246] a clipper? A. Yes.

Q. Is a jig boat ever referred to as a clipper?

(Testimony of Hervey Petrich.)

A. I have never heard of any jig boat being called a clipper.

Q. What is the essential difference between a jig boat and a clipper?

A. A jig boat can be used in very small vessels, and they troll like they troll for salmon. They draw a lure through the water. The poles are indicated. They have lures hanging from these just like a salmon troller. A bait boat is one that has circulating salt water and tanks with live bait, little bait in them kept alive.

Mr. Crutcher: I have no other questions.

Mr. Carey: At this time, Your Honor, I move to strike out, without any disrespect to the witness, all of his evidence for the reason that, according to his own admission, he has not testified to any such operation as we are dealing with here.

(Argument.)

Q. (By Mr. Crutcher): How many crew members are customarily employed on a jig boat?

A. Well, normally, a jig boat would have perhaps three men, two to three men, maybe four. [247]

Mr. Crutcher: I have no other questions.

Mr. Carey: I renew my motion.

The Court: The motion is denied with leave to renew it at the end of all of the testimony and after the close of all of the testimony on behalf of all litigants in the case.

You may step down.

(Witness excused.)

Call the next witness. We will swear the next witness after which we will take a recess until 1:45.

WILLIAM BARQUIST

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Armstrong): Will you state your name, please?

A. William Barquist.

The Court: Is this witness called on behalf of the intervening libelant Barquist?

Mr. Armstrong: Yes. This is the intervening libelant Barquist. [248]

Q. (By Mr. Armstrong:) Where do you reside, Mr. Barquist?

A. Black Diamond, Washington.

Q. Do you have a street address there?

A. Box 342, Black Diamond, Washington.

* * * * *

Q. What capacity were you in in the Navy?

A. I was a seaman first class.

Q. On what type of vessel?

A. I was on several different types of vessels. [249] I was on a seagoing tug and I was in Navy gun crews on merchant vessels, and I served a little bit aboard a submarine tender.

Q. Did you have any experience in the operation of any of these boats while you were on board them?

A. Not in the operation of the boats. My duties

(Testimony of William Barquist.)

were gunnery. I took care of guns, maintained them and manned them if it was necessary.

Q. You did not have experience as a navigator or as a helmsman prior to your going on board the Silver Spray? A. No, I didn't.

The Court: At this time those connected with this case are excused until 1:45 o'clock this afternoon.

(At 11:45 o'clock a.m., Thursday, September 16, 1954, proceedings recessed until 1:45 o'clock p.m., Thursday, September 16, 1954.)

Seattle, Wash., Sept. 16, 1954, 1:45 o'clock p.m.

The Court: You may proceed.

Q. (By Mr. Armstrong): How did you first become acquainted with the vessel Silver Spray or Mr. Tobin? [250]

A. Through an ad in the Seattle Times. * * * * *

Q. Where did you first meet with Mr. Tobin?

A. On board the Silver Spray. * * * * *

Q. Will you tell the Court what representations were made to you about the vessel on that occasion?

A. Well, Mr. Tobin told me it was a very good, seaworthy vessel and was practically fully equipped to go tuna fishing down in San Diego, for the Van Kamp's outfit down there, and he also said they had airplane spotters to go out and spot the fish, and all we would have to do is go out and catch them, and that we would be equipped with refrigeration and bait tanks when we got to San Diego. [251]

(Testimony of William Barquist.)

Q. Did you pay him any money to obtain a working share in this vessel?

A. Not at that date.

Q. Did you at any date?

A. I did. I believe it was about the 8th of May. I give him a bank draft of \$500.00 to hold my job on the tuna clipper.

Q. How much did you eventually pay him in full?

A. When I went aboard on Tuesday, May 11th, I paid him the other \$2000.00, which totaled \$2500.00.

Q. You first went on board to work on May 11, 1954?

A. Yes.

Q. Did you move your gear and personal effects on board the vessel at that time?

A. Yes.

Q. What work did you perform prior to the time the vessel left for Alaska?

A. Well, I worked on general deck work around there, painting, cleaning up, and all sorts of things that were supposed to be done. * * * * *

Q. Was Mr. Tobin present on board during any of this period of time? [252]

A. Yes, he was there occasionally.

Q. Did he tell you at or prior to the time you signed the contract who the master of the vessel was going to be?

A. He said that he was the master and the operator and the owner. * * * * *

Q. Did he advise you as to whether there would be any people on board the vessel who were experienced tuna fishermen?

(Testimony of William Barquist.)

A. Yes, he did. There were supposed to be two experienced tuna fishermen on board or coming aboard.

Q. Did he tell you when they were going to come on board?

A. No, he didn't, but that would be before we sailed.

Q. Did you depart with the vessel to Ketchikan?

A. Yes.

Q. Was the date you left May 18th?

A. May 18th, yes.

Q. Were you requested by Mr. Tobin or any one else in charge of the vessel to consent to this voyage to Alaska? [253]

A. No, I wasn't.

Q. What occurred? How did it occur that the vessel departed for Alaska and how did you find out about it and what did you do?

A. Well, shortly before they left, Tobin said: "We are going to Alaska," and I asked him what happened to the tuna fishing trip, and that was all there was to it. We just went to Alaska. I didn't have any say about it.

Q. What services did you perform when the vessel went to Alaska?

A. I stood wheel watches and worked aboard the vessel. * * * * *

Q. What occurred at Wrangell?

A. Well, we got there about 5:30 on Sunday morning, May 23rd, I think it was, and Ed Peecher and I went up town for a cup of coffee, found a little restaurant open [254] and there was a fellow in there, and we got talking about it. He asked if

(Testimony of William Barquist.)

we come in on this vessel, and we said we did, and we told him we come up to get a load of shrimp, and we asked him if he knew anything about it. He said he knew the people that owned and operated that cold storage plant, or whatever they call it, that had the shrimp, and this man said he would call up the owner and have him come down to the vessel. Well, about an hour or so he came down to the vessel, and he informed us there was no shrimp there for us, and that he had called Seattle and said there wouldn't be no use sending a boat up for shrimp, and after he looked our boat over he said, why, we couldn't haul shrimp any way because we didn't have any refrigeration on it. * * * * * [255]

Q. When did you first discover that Mr. Tobin was not returning with the vessel to Seattle?

A. Oh, that was shortly after we got back to Ketchikan.

Q. Who informed you of this fact?

A. Well, no one in particular. I just heard that kind of via the talk around the boat.

Q. Did any one advise you as to any reason why he was not going back to Seattle with you on board the vessel? A. No. * * * * * [256]

Q. Will you tell us approximately the date of your arrival in Seattle?

A. I think it was June 3rd. * * * * *

Q. Were you on board the vessel on June 4th?

A. No, I don't believe I was, because Capt. Moore told me I might just as well go ahead and go home for a couple of days because he didn't think

(Testimony of William Barquist.)

there would be anything doing aboard the vessel.

Q. When did you return to the vessel?

A. I came down there the 5th, that was Saturday I believe, and there wasn't anything doing or no one around, [257] so I went home.

Q. Do you know whether or not on the 5th Mr. Tobin's gear was on board the boat?

A. I don't believe it was. In fact——

Q. Do you know? A. No, I don't know.

Q. Did you have occasion at any time between the 5th and the 7th to discover whether or not Mr. Tobin's gear was on board the vessel?

A. Well, I know when I took my gear off the vessel all the gear of everybody was gone.

Q. When did you take your gear off the vessel?

A. I believe that was a Sunday, June 6th.

* * * * * [258]

Q. What was the status of the supply of food and fuel, if you know, on board the vessel when it arrived from Ketchikan on the 3rd?

A. I can't say anything in regard to the fuel but I can say there was practically no food on board.

Q. Will you tell us what occurred on the 7th of June, 1954?

A. Well, my wife and I came down and we came aboard the vessel about 8:30 or 9:00 o'clock in the morning and stuck around there. Somebody said that Tobin was supposed to be there that day, and we stuck around all day long, and he didn't show up, but along about in the evening, about 7:00 o'clock I would say, he showed up.

(Testimony of William Barquist.)

Q. Did he come on board the vessel?

A. Yes.

Q. Will you tell us what Mr. Tobin said about the vessel when he came on board on the evening of the 7th?

A. Well, when Mr. Tobin came on board, I said: "What are we going to do now?" And he says: "Go up to my attorney and get your money."

Q. Who were the other people who were present at that time?

A. Well, there was my wife and myself, and Jim Gehrig was there, Don Moore, Mr. Peecher, and I think John Kadlec was there and George Helwig, the engineer. I can't [259] think of any more.

Q. Was Mr. Bunker or Mr. Herning there?

A. Mr. Herning was there throughout the day but he wasn't there that night, that evening.

Q. Did you go with Mr. Tobin to see his attorney?

A. Yes.

Q. Who else went with him?

A. My wife, Jim Gehrig, Don Moore, and I believe this is about all. Oh, Doss Payne, Doss Payne, he went, too.

Q. Who went into Mr. Swontkoski's office?

A. My wife, myself, and Mr. Gehrig.

Q. Did Mr. Tobin go into Mr. Swontkoski's office?

A. Yes.

Q. The four of you are the only ones that went in, as far as you know?

A. Yes.

Q. What was the subject of that conversation?

A. Well, we came out there because we were told

(Testimony of William Barquist.)

by Tobin we would get some money out there, but there wasn't any mention of anybody getting any money. About all that was said by Swontkoski, or whatever you call him, was that our contracts are legal and binding both ways, and that is about all my wife and I had anything to do with.

Q. When did you leave the vessel then?

A. You mean for good, to get off? [260]

Q. Yes.

A. I was back again the 8th, and I never went back any more after that.

Q. Were you ever advised after the vessel returned to Seattle that it was intended that the vessel would go tuna fishing, and when?

A. I was never advised of anything like that, but I was ready to go if it was going. * * * * * [261]

Mr. Armstrong: You may examine. [262]

Cross Examination

Q. (By Mr. Collins): Mr. Barquist, when you went to see Mr. Swontkoski you went for the purpose of trying to get back your original investment?

A. No.

Q. Did you not go to see Mr. Swontkoski to get back your original investment in the Silver Spray?

A. No.

Q. What did you go to see him about?

A. Mr. Tobin told us to come out there and we would get money. He didn't say what kind of money it was.

Q. What kind of money did you expect to get?

(Testimony of William Barquist.)

A. Well, what I expected and I think I was entitled to was money for fishing that we were supposed to do and didn't do. After all, Tobin told me when I went aboard the Silver Spray that I would make anywhere from \$7500.00 to \$12,000.00 a year, and I think I should be entitled to some of that had we gone fishing as we were supposed to.

Q. What exactly was the conversation between you and Mr. Swontkoski?

A. Well, there was very little said, because Mr. Swontkoski, he said that—about all he said was that the contract was legal and binding and there was no money to get. [263]

Q. Well, what did you say?

A. I didn't say anything. There wasn't anything to say. * * * * *

Q. Did you want your \$2500.00 back?

A. I didn't ask him for it. [264]

Q. Is that what you wanted?

A. Well, I wanted some money because I needed money. I didn't ask him for \$2500.00.

Q. But that is exactly what you wanted, your \$2500.00 back?

A. I didn't ask him for it.

Q. Is it not true that you went out to see Mr. Swontkoski to get your \$2500.00 back?

A. Well, I went out there to get money if there was any money to be had, any kind of money.

Q. You wanted your initial investment repaid, did you not?

A. I suppose if he offered it to me I probably

(Testimony of William Barquist.)

would have taken it, but the damage was done——

Q. Then that was the sole purpose of your visit to Mr. Swontkoski's office, was it not?

A. Well, I can't say it was.

Q. Did you and Mr. Swontkoski discuss prospective fishing shares in the future? A. No.

Q. You made no demand upon Mr. Swontkoski but for future fishing shares, did you?

Witness: Will you please repeat that?

(Last question is read by the reporter.)

A. No, I didn't make any demand. * * * * *

Q. You did not expect to be paid for work on the voyage to Alaska, did you?

A. Well, we went to Alaska with the intentions of making some money as far as I was told.

Q. That was later on, was it not? You expected to make money tuna fishing in California after the vessel returned to Seattle, is that right?

A. After the vessel returned to Seattle?

Q. Yes.

A. There was nothing said to me about the vessel ever going tuna fishing any more, not after my \$2500.00 was [266] invested or put in.

Q. You did sign one of these share contracts, did you not? A. Yes.

Q. Did you read it? A. Yes.

Q. Did you understand it?

A. I think I did. * * * * *

Q. Did you make any objection to the trip to Alaska?

(Testimony of William Barquist.)

A. If I would have a chance I would, but I didn't have a chance. * * * * * [267]

Q. You arrived in Seattle on June 3 about 5:30 in the morning? A. I think so. * * * * *

Q. Were you not told that you were permitted to leave the vessel for a few days while it was being drydocked for repairs?

A. Mr. Moore told me I might as well go home for a couple of days because there wouldn't be anything doing. * * * * * [268]

Q. Did you ever write to Mr. Tobin?

A. Yes. I wrote a letter to him once.

Q. To Spokane? A. Yes.

Q. Then you did know his address, didn't you?

A. Yes, but I had to trace it.

Q. When you wrote Mr. Tobin you demanded your money back, did you not?

A. Well, I was getting out of funds, and I needed money, and I wrote Mr. Tobin a nice letter asking him if he couldn't give me some money any way because I needed it.

Q. And in that letter didn't you say that you were aware that the contract provided for 90 days but wouldn't he please try to give you money immediately? * * * * * [269]

A. Yes, maybe I did.

Q. You don't deny that, do you?

A. Well, I may have. I am not going to deny it. * * * * * [270]

Q. Now, you went aboard again on June 6?

A. Yes.

(Testimony of William Barquist.)

Q. And took your belongings off? A. Yes.

Q. What prompted you to do that?

A. Well, it looked like there was nobody around the ship ever, so I took my belongings off so nobody would come and steal them.

Q. And still made no attempt to contact any one? A. No, I didn't. * * * * *

Q. What time of the day did you go aboard the vessel on June 7?

A. June 7? I believe it was around 8:00 o'clock [271] in the morning when I was there.

Q. Accompanied by Mrs. Barquist, were you?

A. Yes, sir. * * * * * [272]

Q. You say that Mr. Tobin showed up sometime during June 7?

A. About 7:00 o'clock in the evening.

Q. And at that time you were there; your wife was there, Gehrig, Moore, Peecher, Kadlec and Helwig, is that correct? A. Yes. * * * * * [273]

Q. What did Tobin say when he came aboard on the evening of June 7?

A. Well, he just came aboard, and I asked him: "What are we going to do now?" And he says: "Well, go out to my attorney and get your money." That is all he said to me. * * * * * [274]

Q. Now then, under what circumstances, when and where and who was present, if any one was present, did Mr. Tobin fire you?

A. There was nobody fired. Tobin just never showed up at the ship, and there was nothing there to eat and so there was nothing there to stay for.

(Testimony of William Barquist.)

Q. You have just testified that he came aboard on June 7th.

A. Well, he didn't stay there very long.

Q. Well, neither did you, right?

A. Well, I had to have something to eat.

Mr. Collins: No further questions.

Cross Examination

* * * * * [275]

Q. (By Mr. Carey): In what respect, Mr. Barquist, do you claim that Mr. Tobin misrepresented anything to you in connection with this proposed venture?

A. Well, when we discussed it before I bought in, why, he told me that we would make anywhere from \$7500.00 to \$12,000.00 a year fishing tuna. That is what sold me on the idea, and he also stated that: "All the contracts we have, we will lay them up here on the table where everybody can study them and read them over and vote on them."

Q. Do you claim those were misrepresentations that you relied upon? Did you believe him, in other words?

A. Well, I don't know what else they could have been, because none of them was ever carried out.

Q. I am not asking about the carrying out end of it, but was it because of those representations he made to you that you advanced your \$2500.00?

A. Yes.

Q. And that is what you are complaining about?

A. Yes.

(Testimony of William Barquist.)

Mr. Carey: That is all.

The Court: You may step down. * * * * *

Mr. Wells: I will call Mr. Norman L. Bunker, on behalf of the libelant Bunker.

NORMAN L. BUNKER

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Wells): Please state your full name and spell your last name.

A. Norman L. Bunker. B-u-n-k-e-r.

Q. Where do you reside?

A. Seattle, Washington, 16232 14th Ave. N.E.

Q. What is your occupation?

A. I am a ship master.

Q. As a ship master, what license or licenses do you have?

A. I hold a license for steam or motor vessels of any gross tons for any oceans.

Q. Is that is what is commonly called an unlimited master's license? A. That is right. [279].

Q. Under such license, are you qualified to navigate a vessel such as the Silver Spray?

A. I am qualified to navigate the United States.
* * * * * [280]

Q. Would you say that it was some time within the first two weeks in May that you first met Mr. Tobin? A. I believe so.

Q. As a result of that conversation, did you see

(Testimony of Norman L. Bunker.)

the Silver Spray? A. Yes, I did. * * * * *

Q. In the course of that observance of the vessel, did you have an opportunity to observe its hold capacity? A. I did. * * * * * [281]

Q. What is the tonnage capacity of the hold?

A. The hold, as I stepped it off, was 2880 feet, which would be 72 tons at 40 cubic feet to the ton. * * * * * [282]

Q. Please tell the Court what was said by Mr. Tobin and by you with reference to employment of you aboard the vessel Silver Spray on June 2, 1954 in Mr. Tobin's room at the Edmond Meany Hotel.

A. Well, I told Mr. Tobin that I understood that he required a navigator aboard the vessel. He said he did. I asked him whether he would be willing to take me, and he said he would be glad to have me, as I recall, and we discussed various aspects of the venture. [283]

Q. What was the nature of the venture being discussed? A. Tuna fishing.

Q. Was it stated to you out of what port the tuna fishing venture would take place?

A. San Diego.

Q. Was it stated when that venture would commence?

A. I understood that the vessel was up in Alaska and was returning, and it would be back within a matter of almost hours, and I assumed that as soon as fuel and stores were taken on board, the vessel would leave. Mr. Tobin told me that the vessel had been gone for several days, weeks, rather, and that

(Testimony of Norman L. Bunker.)

he felt that the crew would appreciate having a couple of days ashore.

Q. Were any statements made to you with reference to the use of the vessel in the service of any particular fishery or cannery organization?

A. Yes. I was told that Mr. Tobin had a contract with Van Kamp's to fish tuna; that this was very good because Van Kamp's was going to provide an airplane which would help in the search of tuna.

Q. Have you ever had any commercial fishing experience? A. None.

Q. I want to ask you again, particularly, was there a statement made to you on June 2 at Mr. Tobin's hotel room [284] as to when the vessel would depart Seattle?

A. The impression that I received was that upon the arrival of the vessel, it was prepared to go fishing, other than the matter of giving the crew a couple of days of shore leave to visit their families. I myself was under the impression that it was only a matter of taking stores and fuel and we would depart.

Q. Were any statements made to you with reference to equipping the vessel with bait tanks or refrigeration?

A. Yes. I understood when the vessel arrived at San Diego the vessel would be fitted with bait tanks and with refrigeration.

Q. Who made those statements to you?

A. Mr. Tobin. * * * * * [285]

(Testimony of Norman L. Bunker.)

Q. During that period of time was the matter of return from your employment discussed?

A. Yes.

Q. What was said?

A. Mr. Tobin said that I could be assured of a good living, and my wife inquired as to what he considered a good living, and he replied from \$7500.00 up to some other figure, that I don't recall, the latter one.

Q. As a result of this conversation and your knowledge of the vessel, were you offered the position of navigator aboard this vessel?

A. I was.

Q. Did you accept the same? A. I did.

* * * * [286]

Q. During the day following June 2, did you receive any instructions relative to your employment aboard the vessel Silver Spray?

A. On the evening of June 2 I was advised that the boat would be in the following day and that I should go down on that day, on the next day, and relieve Mr. Moore.

Q. Who gave you these instructions?

A. Mr. Tobin.

Q. That was on the 2nd?

A. That is on the evening of the 2nd, yes.

Q. Did you go to the Silver Spray?

A. The following day, late in the afternoon, [287] about 5:00 p.m., I went aboard the vessel.

Q. What did you do when you got aboard the vessel?

(Testimony of Norman L. Bunker.)

A. I went aboard for two reasons: One——

Q. What did you do when you got there?

A. I asked Mr. Moore to show me how some of the equipment that I was not familiar with operated, and I looked around the vessel to see what equipment was there and what equipment would be needed for the proposed trip.

Q. Are you talking particularly with reference to navigational equipment? A. That is true.

* * * * * [288]

Q. Were there any conversations with Capt. Moore or Mr. Gehrig relative to the movement of the vessel to drydock?

A. Yes. I suggested to Mr. Tobin and to Mr. Gehrig, as I recall—this was on a Friday, I believe—that rather than put the vessel in a drydock on a Saturday and Sunday and incur added expense, due to overtime for the mechanics, that we wait until Monday before drydocking.

Q. You made the suggestion to Mr. Tobin?

A. As I recall, the three of us discussed it.

Q. In the hotel room or where?

A. At about 8:00 or 9:00 o'clock in the evening in the Edmond Meany Hotel, Mr. Tobin, Mr. Gehrig and myself became aware that the vessel had had an accident, and—— * * * * * [289]

Q. Were you so advised by Mr. Gehrig on this occasion when you and he and Capt. Moore were discussing this, were you so advised by Mr. Gehrig that you could return home? A. Yes.

Q. And did he also at that time advise you he

(Testimony of Norman L. Bunker.)

would call you when your special services were needed? A. Yes.

Q. Did you return to your home? A. I did.

Q. Did he subsequently call you?

A. Not that I recall.

Q. Did you attempt to call him?

A. On many occasions.

Q. Did you succeed in reaching him?

A. Eventually.

Q. When was that, the day, sir?

A. I believe that was about June 10.

Q. What was said by Mr. Gehrig to you on that occasion?

A. Mr. Gehrig told me that the vessel had been attached; that he was no longer the representative for Mr. Tobin; that Mr. Tobin was represented by Mr. Swontkoski.

Q. Have you seen Mr. Tobin between June 2nd or 3rd [291] and now until he arrived in the court room? A. No.

Q. Did you go and see Mr. Swontkoski?

A. I did.

Q. What did Mr. Swontkoski say to you?

A. He told me Mr. and Mrs. Lower had placed a lien on the vessel, and I asked Mr. Swontkoski if Mr. Tobin was going to lift the lien.

Q. Did he respond to that question?

A. To that particular question I don't recall; I don't recall what he said in response.

Q. On June 3 and the days following, did you

(Testimony of Norman L. Bunker.)

regard yourself in the employ of the vessel Silver Spray? A. I did.

Q. Did you hold yourself available to serve aboard her whenever ordered and requested to do so? A. I did. * * * * * [292]

Mr. Wells: That is all the questions I have.

Cross Examination

Q. (By Mr. Collins): Mr. Bunker, as far as you know then, on June 2nd Mr. Tobin had every intention of taking the Silver Spray tuna fishing?

A. That is correct.

Q. Did you discuss jig fishing as well as live bait fishing?

A. Frankly, I wouldn't know what jig fishing was. We discussed live bait.

Q. Didn't you get the impression that Mr. Tobin didn't know anything about tuna fishing?

A. Mr. Tobin told me that he had fished salmon for [295] several years and that he had been making a study of the life habits of tuna fish.

Q. Well, isn't it true then that both of you were more or less groping on a new and untried venture?

A. I believe the trade name is we were both green beans.

Q. You did sign one of these fishing contracts?

A. That is true.

Q. And you understood the purport of the contract? A. That is true.

(Testimony of Norman L. Bunker.)

Q. For what reason did you call Mr. Swontkoski?

A. I called on Mr. Swontkoski to endeavor to find out what Mr. Tobin was going to do to lift the lien.

Q. Did you discuss the \$1500.00 you paid Mr. Tobin?

A. I think at the termination of the conversation I told Mr. Swontkoski to consider this as a formal request for the return of the \$1500.00.

The Court: Will you state how much money in all you paid on account of this transaction?

Witness: I gave a check for \$1500.00 and a promissory note payable within 90 days for \$1000.00.

Q. (By Mr. Collins): You have never been actually fired by Mr. Tobin?

A. No. I have been abandoned by Mr. Tobin.

Mr. Collins: I have no further questions.

* * * * * [296]

Cross Examination

Q. (By Mr. Carey): How long have you been a seafaring man? A. 27 years.

Q. Without going into all the details, I assume you started in as deck hand and worked up to master? A. As deck boy, yes.

Q. With unlimited license?

A. Yes, that is right.

Q. And while you have never been on a fishing expedition, your experience in seafaring affairs has

(Testimony of Norman L. Bunker.)

enabled you to know that fishing is an uncertain enterprise, isn't that correct?

A. Yes, an element of chance.

Q. That nobody in, say, the month of April or May or June of any one year can tell or predict or prophesy [297] how many fish are going to run in July, August or September?

A. I believe they can average it out.

Q. Why do you think so?

A. Fish that are caught are a matter of record, and you can average out any record.

Q. Is it your idea that a man who has had no more fishing experience than Mr. Tobin could predict what the catch of tuna would be in any given year?

A. I believe so if he made a study of tuna; he should be able to tell you what you would make in a given year. The statistics should be there.

Q. Did you believe his prediction?

A. I believed him.

Q. And as result of that, was that the reason you put your money up? A. Yes.

Q. And do you think he misled you, deceived you?

A. He deceived me in some respects, yes.

Q. And that is what you are complaining about?

A. No.

Q. What are you complaining about?

A. I am complaining about the fact that Mr. Tobin wrongfully discharged me or abandoned me, and I am now seeking redress for that. * * * * *

(Testimony of Norman L. Bunker.)

Q. During that 13 days, had you performed any services aboard the boat as navigator?

A. Yes.

Q. What?

A. I observed the equipment of the vessel. I saw what was needed in the way of periodicals, charts, equipment, chronometers, tide tables, parallel rulers, dividers, etc. [301]

Q. And how long did that take you?

A. Took me about a matter of an hour and a half to two hours.

Mr. Carey: That is all. * * * * * [302]

JOHN KADLEC

called as a witness by and on his own behalf, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Your name is John Kadlec?

A. Yes.

Q. And you have previously testified in this case?

A. Yes.

Q. Mr. Kadlec, you have previously testified as to the circumstances of your meeting the respondent and as to your employment aboard the vessel Silver Spray. Would you advise the Court as to the date when you left the Silver Spray, that is the last day you reported aboard her?

A. June 4.

Q. Have you received any compensation from Mr. Tobin or from his agent or from the master

(Testimony of John Kadlec.)

for the work which you performed aboard the Silver Spray?

A. Just the \$5.00 I received in Ketchikan.

Q. That was the \$5.00 to which you previously testified?

A. Yes.

Mr. Crutcher: I have no further questions. [305]

I wish to introduce on behalf of Mr. Kadlec the testimony which he previously gave in support of the Lower case, and I wish to now move to amend the libel of Mr. Kadlec to conform to the proof, and I wish Mr. Collins to be permitted to cross examine upon that issue, that is, the issue presented by the pleadings, without reference to the scope of the direct examination which has just been made.

Mr. Collins: Your Honor, I make the objection because it is absolutely contrary and different than Mr. Kadlec's initial libel.

(Argument.)

The Court: The objection is overruled. The motion for such trial amendment is granted, and you may cross examine the witness further if you wish.

Cross Examination

Q. (By Mr. Collins): Mr. Kadlec, you did not sign a share agreement on the Silver Spray, is that correct?

A. That is correct.

Q. You negotiated with Mr. Tobin for a share in the Sockeye, is that correct?

A. On the Sockeye and/or the tuna boat.

Q. Well, you signed an agreement with Mr. Tobin [306] on the Sockeye, did you not?

(Testimony of John Kadlec.)

A. I signed on both of them, sir.

The Clerk: Respondents' Exhibit A-10.

(Contract (Kadlec) marked Respondents' Exhibit A-10 for identification.)

Q. (By Mr. Collins): You have before you a typewritten document dated April 14th and marked for identification as Respondents' Exhibit A-10. Is that your signature on that document?

A. Yes.

Mr. Collins: I offer it in evidence.

Mr. Crutcher: No objection.

The Court: Admitted.

(Respondents' Exhibit A-10 received in evidence.)

Q. (By Mr. Collins): Now referring to the document, Mr. Kadlec, does it not say you are purchasing a share on the Sockeye?

A. On the Sockeye or a tuna boat.

Q. Will you kindly read the language?

A. (Reading) "In consideration of the sum of \$1500 - \$500 dn. paid by the second party the first party [307] agrees to sell one working share in the fishing boat Sockeye or tuna Boat, owned by the first party."

Q. At that time you did not have any operational interest in the Silver Spray, did you?

A. Just Mr. Tobin's word.

Q. Mr. Tobin did not own the Silver Spray as of April 14, did he?

(Testimony of John Kadlec.)

A. He was planning on purchasing this boat.

Q. You did some work on the Sockeye, did you not? A. A little off and on.

Q. Well, how much did you do?

A. It wouldn't amount to much. I don't know exactly how much it was, probably an hour or so.

Q. Under what circumstances do you claim Mr. Tobin promised to pay you \$100.00 a week on the Silver Spray?

A. Mr. Tobin promised me if I went on the tuna boat, Silver Spray, that I would work for \$100.00 a week.

Q. When was that?

A. On April 14th.

Q. Was any one present? A. No.

Q. Did you tell any one that you claimed wages on the Silver Spray?

A. I told Mr. Swontkoski.

Q. Later on, after the Silver Spray came back, you [308] went out and talked to Mr. Swontkoski, is that right? A. Yes.

Q. Did you then claim that Mr. Tobin owed you \$100.00 a week on the Silver Spray?

A. I told Mr. Swontkoski the words in effect—we talked about the wages of my previous employment, based on a five day week.

Q. Is not this the fact: That you told Mr. Swontkoski that you were entitled to only \$150.00 for wages for your work on the Sockeye, and that you were entitled to your \$500.00 back from Mr. Tobin which you invested in the Sockeye? A. No.

(Testimony of John Kadlec.)

Q. And you had no conversation with any one concerning this so called wage agreement?

A. I don't follow you, sir. Who are you talking about?

Q. I say you had no conversation on board about the so called wage agreement? A. No.

Q. Why didn't you tell your lawyer then when you intervened in this case?

A. I didn't feel it was necessary, sir.

Q. Do you mean to say you thought you were under a wage contract with Mr. Tobin, and at the time you intervened in this action it was unnecessary to tell your lawyer about it? [309]

A. Yes.

Q. That was Mr. Wells, was it not?

A. Yes.

Q. And with your consent, Mr. Wells formally withdrew as your counsel?

A. No, it wasn't that, sir. I don't know why Mr. Wells withdrew.

Q. I am not asking you for any conversation with Mr. Wells because they are privileged. I would like to know, though, how it was that if you had a binding wage contract with Mr. Tobin that you did not tell your lawyer about it for the purposes of this suit and brought it up in the last few days for the first time.

Mr. Crutcher: I object to that statement for the reasons it is not a question and counsel is obviously attempting to elicit a confidence between client and attorney.

(Testimony of John Kadlec.)

The Court: The objection is sustained.

Mr. Collins: I have no further questions.

Cross Examination

Q. (By Mr. Carey): Mr. Kadlec, was it yesterday you were on the stand before?

A. Yes. [310]

* * * * *

Q. Isn't it a fact that yesterday you said you had no discussion with Tobin at all about going on the trip to Alaska? A. I didn't.

Q. If you had no discussion with Tobin about going to Alaska, how could it possibly be that you and he agreed on \$100.00 a week while on the trip to Alaska? [312]

A. I don't know that, sir. The fact is that I learned from the other men on board that we were going to Alaska.

Q. My question is if you had no discussion with Tobin about going on the trip to Alaska, how can it possibly be that you had an agreement with him to pay you \$100.00 a week while on that trip. Can you answer that?

A. Sir, I didn't care where the boat went as long as my wages went on.

Q. That is the only answer you can make, is it?

A. Yes.

Mr. Carey: That is all.

Redirect Examination

Q. (By Mr. Crutcher): Mr. Kadlec, when was

(Testimony of John Kadlec.)

the conversation with Mr. Tobin in which he mentioned the figure of \$100.00 a week for working on the Silver Spray?

A. At the Edmond Meany Hotel, April 14.

Q. At that time did Mr. Tobin tell you he owned the Silver Spray? A. Not at that time.

Q. At that time he told you he owned the Sock-eye? A. Yes.

Mr. Crutcher: I have no other questions. [313]

The Court: Step down.

(Witness excused.)

The Court: Call the next witness. [314]

* * * * *

Mr. Crutcher: At this time, may it please the Court, the intervening libelants and the libelant, who are crew members, rest their case in chief.

Mr. Carey: For the record, Your Honor, for the same reasons already stated, namely, the objection on the ground of lack of jurisdiction, I move to dismiss the original libel of Lower and all the intervening libels, other than the mortgagees, of course, upon the ground that whatever the pleadings may have been, the evidence now before the Court, and that is controlling, definitely shows that the only cause of action is one for deceit, not within the jurisdiction of the Admiralty Court.

The Court: The motion is denied.

Mr. Collins: Respondent Tobin now moves to dismiss all libels upon the ground that they do not state a cause of action against the vessel in partic-

ular or against Mr. Tobin personally in this particular proceeding. [315]

(Argument.)

The Court: The motions are denied with leave, in each instance, for their being renewed at the close of all the evidence.

(Discussion.)

The Court: The opportunity of proving the intervening libel of the intervenors Putnam and Overman, the mortgagees, is reserved to them until after the respondents' case in chief, and Mr. Carey is permitted, therefore, to produce their case out of order in that manner.

You may proceed with the respondents' case in chief.

Mr. Collins: I will call Mr. Swontkoski.

JOSEPH F. SWONTKOSKI

called as a witness by and on behalf of respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): Your full name, please?

A. Joseph F. Swontkoski—S-w-o-n-t-k-o-s-k-i.

Q. Your profession, please?

A. I am an attorney at law.

Q. At one time did you represent Mr. Tobin in connection with the Silver Spray? A. I did.

Q. Are you willing to waive the privilege of communication between attorney and client?

A. Yes.

(Testimony of Joseph F. Swontkoski.)

The Court: Is the client also willing?

Mr. Collins: I think Mr. Tobin should be sworn so I may ask him that one question.

The Court: You may rise and be sworn.

ROBERT J. TOBIN

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): Mr. Tobin, do you understand that conversations between an attorney and his client are privileged unless waived by the client?

A. Yes. [317]

* * * * *

Q. You are willing to waive your privilege as to any conversations or discussions? A. Yes.

Mr. Collins: That is all.

(Witness excused.)

JOSEPH F. SWONTKOSKI

called as a witness by and on behalf of respondents, having been previously sworn, was examined and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Collins): Did you have occasion to talk with Mr. Kadlec? A. Yes, sir. [318]

* * * * *

(Testimony of Joseph F. Swontkoski.)

Q. What was the conversation?

A. My best recollection is that Mr. Kadlec came to [319] my office and inquired whether he could get his money for wages from Mr. Tobin. I asked him how much the wages were and he said \$150.00, about three weeks' wages due. My recollection further is that this did not relate to the Silver Spray. I was at that time aware of the matter of the Sockeye, having discussed it with Mr. Tobin who was then my client, and I could not then advise him whether or not he would be paid, but he was then willing to waive his claim of \$500.00 on the Sockeye in payment for \$150.00. That is my best recollection. He informed me that he then had an attorney, at which point I ceased discussing the matter with him.

Q. Did you then inform Mr. Tobin of that conversation?

A. I wrote him a letter recounting what had happened since the last time I saw him. It would be the next day, as a matter of fact.

Q. Did Mr. Kadlec make any claim with respect to the Silver Spray at all?

A. Not to my recollection, sir.

Mr. Collins: You may examine.

Cross Examination

Q. (By Mr. Crutcher): Mr. Swontkoski, in this conversation with Mr. Kadlec, you say that the discussion of wages related solely to the Sockeye, is that correct? [320]

(Testimony of Joseph F. Swontkoski.)

A. Yes, sir, that is my best recollection of it.

Q. There was no discussion at that time as to any claim which he might have for wages on the Silver Spray?

A. No, sir.

* * * * *

Q. What did you do further with respect to the wage claim which Mr. Kadlec gave you of \$150.00 on the [321] Sockeye? You referred it to Mr. Tobin, I believe you said. Did you thereafter take any action with respect to that claim?

A. No, sir. I merely advised my client as to what had taken place, as to his rights. In other words, this letter that I referred to was an extensive letter on the whole discussion of his fishing venture, just brought him up to date. I mentioned that in one of the paragraphs.

Mr. Crutcher: I have no other questions.

Mr. Collins: No further questions.

The Court: Step down.

(Witness excused.)

ROBERT J. TOBIN

called as a witness by and on his own behalf, having been previously sworn, was examined and testified further as follows: * * * * * [322]

Direct Examination—(Continued)

Q. (By Mr. Collins): Your name is Robert J. Tobin?

A. Yes.

Q. Where do you live, Mr. Tobin?

A. 3717 East Cleveland, Spokane, Washington.

Q. How long have you lived in Spokane?

(Testimony of Robert J. Tobin.)

A. Over a year.

Q. Prior to your participation in the Silver Spray, what was your occupation?

A. I was working on the railroad.

Q. At what wage?

A. Approximately \$500.00 a month. [323]

* * * * *

Q. When did you come in contact with the Silver Spray?

A. It was at Fisherman's Wharf. I was there with a Jack Flagler who has a commercial boat company I believe, and Mr. Overman come up and asked Mr. Flagler if the charter had come through on the boat. They were anticipating some kind of a charter or something, and Mr. Overman invited me over to see a nice boat. When I seen the boat, I was thrilled with the boat. I mean it was something, and we talked further on it, met further on it, and we came to a written agreement, giving the lien I had in the Sockeye as security until I got hold of \$5,000.00, and then title would be turned over to me or a mortgage. [324]

* * * * *

Q. How long prior to April 28 did you first start to negotiate with Putnam and Overman?

A. I don't recall. It was a few days before. It was either one or two days before the signing of the purchase agreement.

Q. How long before the mortgage was the purchase agreement?

A. A couple of weeks, three weeks I guess. I

(Testimony of Robert J. Tobin.)

had until June 1st to get the mortgage, but I picked it up and got it cleared with the money I received from the shareholders.* * * * * [325]

Q. When did you come in contact with Kadlec?

A. Mr. Kadlec answered—I was trying to—endeavoring to get shareholders for a trolling boat. Mr. Kadlec answered an ad in regards to that in which he wanted to go aboard it as an investment.

Q. To which vessel did that pertain?

A. The Sockeye.

Q. Did Mr. Kadlec pay you money?

A. Yes, \$500.00.

Q. What is your response to his wage claim on the Silver Spray?

A. He has no wage claim. There was no wage agreement whatsoever. As a matter of fact——

Q. Did you have any discussion with Mr. Kadlec about the Alaska voyage?

A. Yes, I believe I did. I don't know what it was though. There were so many discussions. I don't know at this time. He was in full knowledge that we were going to [326] Alaska to take this cruise.

Q. What was his attitude about going?

A. Wonderful. * * * * *

Q. How did you get in contact with Mr. Bunker?

A. Mr. Bunker answered the same ad in regards to Alaska fishing, and consequently the talk I had with him that—now, I could be wrong. I don't know, but I believe he answered the ad in regards to Alaska fishing, and I told him of my inexperience and I needed a master.

(Testimony of Robert J. Tobin.)

Q. Just a moment. When did you contact Mr. Bunker? * * * * * [327]

A. June 2, I believe. * * * * * [328]

Q. How was the meeting arranged?

A. Through Mr. Gehrig. * * * * *

Q. What did you talk about?

A. We talked about the tuna venture, about the possibilities of the boat coming back later and used for an excursion boat in Alaska, which would be a more sound basis for a livelihood out of it.

Q. What did you tell him of your fishing experience? * * * * *

A. I told him I had one year trolling experience, or one season, in Alaska.

Q. Did you discuss the terms of the contract in detail? [329]

A. Yes, sir. * * * * * [330]

Q. Did you talk about the risks of tuna fishing?

A. Yes, sir, we did.

Q. What did you say and what did he say?

A. My conversation was that it was a gamble. Mr. Bunker's conversation was this: He said: "I am reckless with my own money, but I am very careful with other people's money," and he said: "I like to gamble."

Q. Did you discuss the Van Kamp Company?

A. What I knew of it.

Q. What did you and Mr. Bunker talk about with respect to the Van Kamp Company?

A. With respect to selling our fish to Van Kamp.

Q. Did you tell him you had a contract with Van Kamp?

(Testimony of Robert J. Tobin.)

A. No, sir, I didn't.

Q. Did you have a contract with Van Kamp?

A. No, sir, I didn't.

Q. How did you hear about the Van Kamp Company?

A. From booklets on the boat, which they took one themselves. * * * * * [331]

Q. How did you get in contact with Mr. Herning?

A. He answered an ad in regards to tuna fishing.

Q. Will you take out Mr. Herning's contract?

A. I have it here.

Q. What is the date of that?

A. 27th day of April.

Q. With respect to that date, when did you first see Mr. Herning?

A. I believe it was two days before. * * * * *

Q. Did you talk to Mr. Herning on board the Silver Spray?

A. Yes, I did.

Q. About two days before April 27?

A. Yes.

Q. Did you discuss tuna fishing?

A. Yes.

Q. What did you tell him about your proposed venture, and what did he tell you?

A. I told him, explained to him, that I had just gotten, had just bought the boat, that I knew nothing about [333] the boat. It was the biggest boat I had ever been on in my life. I knew nothing about diesel engines. He said he knew diesel engines and told me of his experiences in Alaska fishing, and I was very impressed by Mr. Herning because I be-

(Testimony of Robert J. Tobin.)

lieved he had a lot of knowledge that would help me in a venture I knew nothing about. * * * * *

The Court: We will have to continue proceedings until tomorrow morning. The Court is adjourned until tomorrow morning at 10:00 o'clock.

(At 4:30 o'clock p.m., Thursday, September 16, 1954, proceedings recessed until 10:00 o'clock a.m., Friday, September 17, 1954.) [334]

Seattle, Wash., Sept. 17, 1954, 10:00 o'clock, a.m.

The Court: You may proceed.

Q. (By Mr. Collins): Mr. Tobin, will you direct your attention to Mr. Herning's contract? Do you have it before you? A. Yes, sir.

Q. What is the date of it?

A. The 27th of April, 1954.

Q. Mr. Herning made the Alaska trip with you?

A. Yes, he did.

Q. Will you direct your attention to Mr. Peecher's contract? What is the date of that contract?

A. His is the 4th day of May, 1954.

Q. How did you come in contact with Mr. Peecher?

A. In response to an ad in the paper.

Q. Where did you meet him?

A. He came to the boat.

Q. How did you arrange the meeting?

A. I left a phone number at Fisherman's Wharf, Room 211.

Q. With reference to May 4, when did you first talk to Mr. Peecher? [335]

A. Several days before.

(Testimony of Robert J. Tobin.)

Q. Did you tell Mr. Peecher you were an expert tuna fisherman? A. No. * * * * *

Q. What did you and Mr. Peecher talk about on your first meeting?

A. As near as I recall, our conversation was in regard to the boat; if the boat wasn't successful fishing, we would use it for freight or charter. It had tremendous possibilities. Mr. Peecher told me that if we went into freight and that end, he knew how to handle all the lines, take care of all the cargo, and——

Q. What representations, if any, did you make to Mr. Peecher, regarding a contract with Van Kamp Company? A. None whatsoever.

Q. Did you talk about Van Kamp at all?

A. Yes, we talked about Van Kamp.

Q. What was the conversation?

A. Well, I hoped to fish for Van Kamp. * * * * *

The Court: If in doing so, you are stating the substance of what you said and what he said.

A. Well, there were varied discussions. One was Van Kamp. One was Honolulu. Which would be the best fishing and the place to go.

Mr. Collins: Your Honor, this may be irregular but I think it is important. Due to the fact that the replies to Mr. Tobin's affirmative defenses which came in, the last one on the day previous to the trial, now allege fraud and misrepresentation by Mr. Tobin, I had Mr. George Bender, a certified public accountant, go through all of the Silver Spray vouchers. He has made a full accounting of

(Testimony of Robert J. Tobin.)

the receipts and disbursements of the funds paid him by the libelants. If in order, I would like to put Mr. Bender on the stand. * * * * * [337]

The Court: You may step down temporarily.

(Witness excused temporarily)

The Court: You may inquire of this witness up to the point where objection is made, and then I will hear the objection and give to the one making it the opportunity to state the objection.

The Clerk: Respondents' Exhibit A-11.

(Receipts and Disbursements marked Respondents' Exhibit A-11 for identification.)

GEORGE D. BENDER

called as a witness by and on behalf of respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): Your name, please.

A. George D. Bender.

Q. What is your profession, Mr. Bender?

A. Certified public accountant. * * * * *

Q. Mr. Bender, at my request, did you examine the vouchers pertaining to the expenditures on the Silver Spray? A. I did.

Q. Were you given the complete records of the Silver Spray, as far as you know?

A. As far as I know, it was complete, yes.

* * * * * [339]

(Testimony of George D. Bender.)

Q. (By Mr. Collins): You have before you, Mr. Bender, Respondents' Exhibit A-11 for identification. Will you identify that?

A. It is the report that I prepared. It is entitled "Receipts and Disbursements Statement, Robert J. Tobin, operating Silver Spray Fishing Vessel".

Q. Made in accordance with all of the vouchers which Mr. Tobin submitted to you and made in accordance with the information he gave you orally?

A. That is correct.

Mr. Collins: I offer Respondents' A-11.

Mr. Crutcher: We object to its admission. We see no relevance to this——

(Argument.) * * * * * [346]

The Court: You may, on voir dire, interrogate on that point as to whether or not the data in its original form submitted to him is voluminous or intricate or involved and hard to understand by a layman, matters of that sort.

Voir Dire Examination

Q. (By Mr. Crutcher): Mr. Bender, at the time you prepared this statement, did you have before you a systematic set of records of any sort?

A. I had just a little brown-backed memorandum book in which Mr. Tobin had listed the moneys received and paid out. It was in this file (indicating). I imagine it is still here.

The Court: That ought to be available for cross examination when that time comes.

(Testimony of George D. Bender.)

(Witness removes brown note book from file.)

The Court: Is that it?

Witness: Yes.

The Court: Is that the original record, the only original record, submitted to you?

Witness: That is correct.

The Court: Is there any objection to marking [347] it for identification?

Mr. Collins: No, Your Honor.

The Clerk: Respondents' Exhibit A-12.

(Brown Note Book marked Respondents' Exhibit A-12 for identification.) * * * * *

Q. (By Mr. Crutcher): Did you examine any cancelled checks? A. No.

Q. Did you examine any receipts from the vendees themselves?

A. Well, not other than the bills that are in the files here.

Q. How many of the items in your schedule of disbursements are supported by such vouchers?

A. Well, the majority of the items in there. I [348] would say substantially all of them are supported by little cash register tickets or invoices, which I have here.

The Court: Well, bring them out, too. I want to bring out all of the original record sources submitted to you and considered by you when you were making up Respondents' Exhibit A-11.

(Witness hands pouch to Clerk.)

Q. (By Mr. Crutcher): While those are being marked for identification, did you in your capacity

(Testimony of George D. Bender.)

as a certified public accountant determine that the expenditures shown in this list were made for the purpose of operation of the Silver Spray?

A. They were all brought in to me with the explanation that those were the expenses for the Silver Spray, and I treated them as such.

Q. Will you answer the question? * * * * * [349]

A. No. I didn't have any way of determining whether they were Silver Spray or what they were.

Q. Did you make any inquiry of any person shown on this list as a payee as to whether he had received such a payment? A. No.

Q. Did you make any audit, in the customary sense of that term, whatsoever?

A. Not an audit. It was just merely a listing of Mr. Tobin's disbursements.

Q. This, then, is simply a summary of the disbursements as shown to you by Mr. Tobin?

A. That is correct.

Mr. Crutcher: I have no other questions.

* * * * * [350]

The Clerk: Respondents' Exhibit A-13.

(Folding Pouch marked Respondents' Exhibit A-13 for identification.)

The Court: The Court has before it Respondents' Exhibit A-13, which is a number of vouchers said by the witness to have been given to him—I am not sure he expressly said so—but A-13 was produced by the witness now on the stand in response to some question about where were the other source mate-

(Testimony of George D. Bender.)

rials. Further inquiry might be made on that point as to what these A-12 and A-13 are.

Mr. Crutcher: I believe he has said sufficient on that now to establish that A-11 prepared by Mr. Bender is nothing more than a list of matters provided to him by Mr. Tobin and as such has no evidentiary value in any court.

(Argument.)

The Court: The ruling is that the objection to Respondents' Exhibit A-11 is sustained. [351]

(Respondents' Exhibit A-11 rejected.)

Mr. Collins: May Mr. Bender be excused?

The Court: Mr. Bender may be excused.

(Witness excused.) * * * * *

ROBERT J. TOBIN

called as a witness by and on his own behalf, having been previously sworn, was examined and testified further as follows:

Direct Examination—(Continued)

* * * * * [352]

Q. (By Mr. Collins): Mr. Tobin, you admit receiving various sums from Mr. Bunker, Mr. Herning, Mr. Peecher and Mr. Barquist? A. Yes.

* * * * * [353]

Q. What did you do with the money?

A. I used it to outfit and operate the Silver Spray.

Q. Did you use any part of that money as a down payment on the Silver Spray? [354]

(Testimony of Robert J. Tobin.)

A. \$5,000.00 of it. * * * * *

Q. You are talking about spending the \$11,500.00, are you not, Mr. Tobin?

A. Yes, I am.

Q. That is the money invested by these people?

A. Yes.

The Court: That is sufficient.

Q. When did you put the vessel in drydock after it came back from Alaska?

A. I am not quite sure of the date. It was after the 7th.

Q. How much was that bill? A. \$365.00.

Q. Did you pay the bill? A. Yes. * * * * *

Q. Did you use any of these funds for your residence in Spokane? A. No, sir, I didn't.

Q. How did you maintain your home in Spokane? A. I borrowed \$2,000.00 in Spokane.

Q. In order to engage in this enterprise?

A. Yes, sir.

Q. Do you still owe that money?

A. Yes.

Q. Do you recall how much you paid the Pacific Fishing & Trading Company? [356]

A. \$200.00 and some dollars. I am not sure.

The Court: That was for what?

Witness: Food, provisions for the boat.

Q. (By Mr. Collins): Who were the legal fees paid to?

A. Mr. Swontkoski and Mr. Arthur Hanson in Spokane. * * * * *

Q. Did you use this \$11,500.00 in its entirety

(Testimony of Robert J. Tobin.)

to pursue your operation with the Silver Spray?

A. Absolutely. * * * * * [357]

Q. Do you have the contracts before you, Mr. Tobin? A. Yes.

Q. Please direct your attention to Mr. Peecher's contract. Now, the date of that contract is what?

A. May 4, 1954.

Q. Did Mr. Peecher go on the Alaska trip with you? A. Yes, he did.

Q. Willingly? A. Yes, sir. * * * * * [359]

Q. What was your explanation for the voyage?

A. For one thing, we were having a lot of engine trouble. I wasn't sure of the craft. I had never been out in it except to Port Townsend. We were approached by Shell Fish Incorporated and asked if we wanted to haul shrimp from Alaska under contract. Everybody concerned discussed the contracts, and I heard no more from them for a few days. The shareholders asked me: "What has become of Shell Fish Incorporated?" So we decided to take a shake-down cruise. The first night out Shell Fish Incorporated called us on the phone, on the radio, told us to pick up 100,000 lbs. of shrimp at Wrangell and Petersburg. We were in contact with them every night on the radio, and every shareholder heard them and listened to the conversation. When we arrived in Ketchikan, Mr. Rude called me on the phone, and he said: "Mr. Tobin, do you want a contract or do you just want to haul one trip?" I said: "We will take one trip out." I asked him to send me a wire, which he did, stating to pick [360] up 100,-

(Testimony of Robert J. Tobin.)

000 lbs. of shrimp, and the money would be deposited with—I believe it was—the Seattle National Bank—I don't recall. I then had the boat refueled, gave the wire to Mr. Lower, and they proceeded to Wrangell. When they arrived at Wrangell, they were informed—— * * * * *

Q. When did you leave this vessel?

A. I believed we arrived May 21st. I am not sure. That is the morning I left the vessel at Ketchikan.

Q. Did you talk with any of the shareholders about your departure?

A. Not at that time. I stayed in Ketchikan until the boat returned from Wrangell.

Q. I am directing your attention to your departure from Alaska?

A. Yes. I had conversations with Mr. Lower.

Q. Anybody else?

A. I believe every shareholder, Bill Barquist, for one.

Q. What did you tell them?

A. Mr. Lower was my—and Capt. Moore—were my main conversation about my leaving for Seattle—and Mr. Peecher.

Q. What reason did you give them for leaving?

A. To try to collect the money from Shell Fish Incorporated on sending us to Wrangell for shrimp and none for the boat when it arrived.

Q. You came back with Mr. Payne, was it?

A. Mr. Peecher.

(Testimony of Robert J. Tobin.)

Q. Why did Mr. Peecher leave the vessel, if you know?

A. Mr. Peecher's hands were swollen, and he felt very ill. * * * * * [362]

Q. What conversations did you have with Mr. Peecher, if any, relating to his withdrawal as a shareholder from the Silver Spray?

A. I told Mr. Peecher I would replace his share as fast as I possibly could.

Q. What did he tell you about it?

A. Well, he said: "That is fine, Bob." He said: "I don't want any trouble, and all I want is a quiet settlement." * * * * *

Q. Do you have Mr. Barquist's contract there?

A. Yes, I do.

Q. What is the date of it?

A. 4th of May, 1954, William and Mary Barquist.

Q. With respect to the date of May 4, when did you first see Mr. Barquist?

A. Three or four days previous. * * * * *

Q. Now, I am directing your attention to that first meeting. What did you tell Mr. Barquist and what did he tell you?

A. I explained to Mr. Barquist that we could fish, freight or charter. The boat could be very versatile. I told him I had a \$30,000.00 mortgage. I don't remember that [364] day whether he seen the mortgage. He seen the mortgage. I showed it to him. And he asked me for a copy of the contract.

* * * * * [365]

(Testimony of Robert J. Tobin.)

Q. On the vessel's return voyage, did you get a ship-to-shore call when the ship was out in the Sound?

A. I called the ship the night before it arrived.

* * * * * [367]

Mr. Collins: Capt. Moore is now in the court room. * * * * *

Q. (By Mr. Collins): Did Mr. Lower and Capt. Moore comply with your request to meet you at the Hotel Meany?

A. Yes, they did—at 5:30 in the morning.

Q. On what day?

A. I believe it was the 3rd—the morning the boat arrived.

The Court: You mean June 3, 1954?

Witness: Yes.

Q. (By Mr. Collins): What conversation did you have with Mr. Lower [368] at that time?

A. When he arrived at the room, we shook hands, and I asked Mr. Lower—I said: "I am endeavoring to lease a boat to haul freight with. Do you want to go tuna fishing or do you want to go up North?" He said he would like to go North with Capt. Moore.

Q. How long did that meeting last?

A. Oh, I would say a half hour.

Q. When did you see Mr. Lower again?

A. I seen him over at the Wharf Restaurant that evening at Fisherman's Wharf.

Q. Who was present at the time?

(Testimony of Robert J. Tobin.)

A. Capt. Moore, Mr. Gehrig, Doss Payne, Harry Lower.

Q. Confining yourself to Mr. Lower, what conversation did you have with him at that time at Fisherman's Wharf?

A. Told Mr. Lower I was going home; my daughter was sick. I asked him if he wanted to ride as far as Ellensburg. He said: "No. My wife is coming here."

Q. What happened throughout the remainder of June 3rd as far as you are concerned?

A. I spent the entire day endeavoring to see that the boat got to drydock so we could get the screws repaired immediately, take supplies and provisions aboard, and go South. [369]

Q. When did you arrive in Seattle from Ketchikan? A. I don't recall the date.

Q. With respect to June 3, what is your best recollection as to the time you may have reached Seattle? A. Possibly a week before.

Q. What did you do while in Seattle?

A. I checked around to see what it was going to cost to be bait-outfitted; I checked around to find out about refrigeration. I was advised my refrigeration should be got in the South because it is done better and also hunting for Mr. Nybach who had formerly contacted me before in regards to taking us South and teaching us how to fish and how to set the boat up in such a way it would be profitable.

Q. You went back to Spokane the evening of the 3rd? A. Yes, sir, I did.

(Testimony of Robert J. Tobin.)

Q. What communications did you have with any of the shareholders while in Spokane?

A. Mr. Peecher called me up and cursed at me and used vile language over the phone, and Mr.——

Q. On what day?

A. I believe it was the next day.

Mr. Armstrong: The next day from what?

A. I believe it was the 4th.

Q. Who else communicated with you?

A. Mr. Gehrig. [370]

Q. Do you remember I am talking about shareholders? A. Oh, none communicated.

Q. What other shareholders, aside from Mr. Peecher, contacted you, if they did, while you were in Spokane? A. None whatsoever.

Q. Did you try to contact them?

A. No. I went to an attorney right then.

Q. When you met with Mr. Lower and Capt. Moore on the 3rd, what instructions did you give Mr. Lower, if any, with respect to the welfare of the shareholders for the next several days? I mean at your meeting in the morning at the Edmond Meany Hotel.

A. I told Capt. Moore to let the other fellows go home for a couple of days. I asked him how long he thought it would take to repair the screws and turn the boat over to Capt. Bunker, and I asked Harry Lower if he would stay and help Don get the boat to drydock, and he said yes.

Q. Who is Don? A. Capt. Moore. I am sorry.

Q. When did you return to Seattle?

(Testimony of Robert J. Tobin.)

A. The next Monday, the 7th, I believe.

Q. What happened on Monday?

A. I went aboard the ship to endeavor to talk with the shareholders. * * * * * [371]

Q. Well, whom did you talk to at that time?

A. I couldn't talk to anybody. They were talking to me.

Q. Of the shareholders on board, who said what to you? [372]

A. It was Peecher and Mrs. Barquist.

Q. Well, what did they say?

A. Well, they called me——

The Court: You do not have to use profane language. Your statement indicating that in your former answers is a sufficient type of answer on that question. I do not wish you to use any profanity even though it may have been used by somebody else, but you can indicate the subject and the manner of speaking, et cetera, in appropriate language.

A. Well, Mr. Payne was also there.

Q. Well, of the shareholders there, what did they tell you?

A. "We want our money back by 8:00 o'clock in the morning or you are going to get 15 years in prison," and Mr. Peecher said: "I have another \$25.00 here that sees you get there."

Q. Did you discuss the terms of the contract?

A. I had no chance. I asked them to go out to my attorney.

Q. How long were you on board?

A. A very short time.

(Testimony of Robert J. Tobin.)

Q. Are there any other events connected with the Silver Spray on that date, Monday, June 7, as far as you are concerned? [373]

A. Yes. Mr. and Mrs. Barquist rode out with Mr. Gehrig and Mr. Smith to my attorney's office then.

Q. Were you there?

A. I was there; Capt. Moore was there. Capt. Moore and Doss Payne stayed outside.

Q. What was said in the lawyer's office?

A. Mr. Barquist says: "I don't want any trouble with any one." He said: "All I want is my \$2500.00 back, and I will go to the contract and give you 90 days before I file suit against you." * * * * *

Q. What were the later events concerning the Silver Spray, that is, after the 7th?

A. After this, I believe Mr. Barquist went home. [374] Mr. Peecher went back to Portland. I had the Silver Spray put in drydock. It was then attached by Mr. and Mrs. Lower. I went on ahead and paid for the repairs of the screws and had it fixed and endeavored to get the boat released time and time again so that I could proceed with the operation.

Q. Detail your efforts in connection with your attempt to release the vessel.

A. I had communications with Mr. Crutcher. I tried to get bond up. They wanted cash bond because they were asking \$5,000.00 wages. It would cost \$7,000.00 total to raise the bond. I could not get that up.

(Testimony of Robert J. Tobin.)

Mr. Crutcher: I would like the witness to refer specifically to events, if possible.

The Court: Try to be as specific as you can so that others may have some idea and be reminded of what occurred.

A. (Continued): I met with Mr. Crutcher in his office.

The Court: On what day approximately?

Witness: It was after that date some time. I do not recall the date.

A. (Continued): We discussed the subject in relation to getting Mr. Lower's \$2500.00 back, and nothing could be worked out. I kept coming back to Seattle. I would go over home and I would come back to Seattle and try to get [375] the boat released, try to get it working, endeavored to get other people interested in it. * * * * * [376]

Q. Continue now with your efforts to release the boat or with facts relating to the boat?

A. Capt. Moore and I had a meeting with Winehart Breweries in Yakima, the representative. Mr. Moore arranged it. We were endeavoring to get a job for the Silver Spray hauling beer to and from Alaska.

Q. Were you offered any specific contracts?

A. Yes. I was offered a specific contract by, I believe, Church. They are a charter agency. They said if I could get the boat released, he would say—— * * * * * [377]

Q. What was the charter offered to you?

A. Gee, I don't recall, sir. * * * * *

(Testimony of Robert J. Tobin.)

Q. How much were you offered for the use of the vessel?

A. I think it was approximately \$100.00 a day.

Q. Over what period of time?

A. Offer probably ran for a couple of months.

Q. What happened to your personal belongings that you left on board in Ketchikan?

A. I took them off in Seattle, just part of them.

* * * * * [378]

Mr. Collins: Respondents offer A-12 and A-13.

The Court: A-12, in my opinion, is not admissible. A-13 may be. Is there any objection?

(No response.) A-13 is admitted. A-12 is not.

(Respondents' Exhibit A-12 rejected.)

(Respondents' Exhibit A-13 received in evidence.) [380]

Cross Examination

Q. (By Mr. Crutcher): Mr. Tobin, did you tell Harry Lower you owned the Silver Spray when you talked with him on April 17, 1954?

A. I told him I was purchasing the Silver Spray.

Q. Answer the question, please.

A. Yes, I did.

Q. Did you own the vessel on that day?

A. Yes, I had possession.

Q. I asked if you owned the vessel on that date?

A. Yes.

Q. I refer to your answer to Interrogatory 1, in which the following interrogatory was addressed to

(Testimony of Robert J. Tobin.)

you to be answered under oath: "On what date did you become the owner of the vessel Silver Spray?" You answered: "On or about April 28, 1954." Is that answer true or false? * * * * * [381]

A. It is true. * * * * *

Q. Then as of April 16, 1954, you were representing that you owned and operated the Silver Spray? A. No.

Q. Well, Mr. Tobin, this exhibit which is before you and bears your signature states: "Silver Spray Owned and Operated by R. J. Tobin."

A. Yes.

Q. Well, then you were representing that you owned the vessel? [382] A. Yes.

Q. But you did not purchase it until April 28?

A. I had a purchase agreement.

Q. I say you did not purchase it until April 28, 1954, did you? A. That could be true, yes.

Q. Either it is true or is not true.

A. It is true.

Q. Did you tell Harry Lower you did not own it but were simply purchasing it?

A. I showed Mr. Lower the purchase agreement.

Q. Did you tell him that you owned it or did you tell him that you were purchasing it?

A. I told Mr. Lower I was purchasing it and we would have the mortgage within a week or so. * * * * * [383]

Q. Can you explain to the Court what this working share is in a vessel? [385]

(Testimony of Robert J. Tobin.)

A. The working share was to be divided out of the profits of the vessel.

Q. Does it give to the party who contracts with you any right or interest in the vessel itself?

A. No.

Q. So these people were simply your employees?

A. No. They were not.

Q. I refer again to the terms of your contract, clause 2. (Reads clause 2 of Respondents' Exhibit A-1.) You were the first party in these contracts, were you not? A. Yes.

Q. So that these people were to work under your orders? A. Yes.

Q. Then in what respect were they not your employees?

A. In the respect that they had the right to share in all the profits of the boat.

Q. As a means of compensation?

A. As a means of compensation. They could receive their money back. They understood that it was money to be used for the venture.

Q. What was the purpose of this money?

A. Was to outfit the Silver Spray.

Q. And also to buy it? A. Yes. [386]

Q. In other words, these people were advancing money to you so that you could buy the boat, is that right? A. That is right.

Q. Did you tell those people that? A. Yes.

Q. I ask you now specifically did you tell Harry Lower that you were taking a part of this money and with it paying the down payment on the boat?

(Testimony of Robert J. Tobin.)

A. I don't recall. * * * * *

Q. Did you tell Mr. Herning that you were going to take part of the working share money and make a down payment on the vessel? A. No.

Q. Did you use the money he advanced for that purpose? A. Yes. * * * * * [387]

Q. Did you tell them that you were not putting any of your own money into the venture?

A. No. I did not.

Q. How much of your own money did you put into the venture? A. I borrowed \$2,000.00.

Q. What time was that?

A. That was some time in March. I believe March some time. I am not sure.

The Court: How much, if any, of that \$2,000.00 did you put into the purchase price you were paying or obligated to pay for the Silver Spray?

A. I put that money into a vessel called the Sockeye.

Q. With respect to the Sockeye, did you receive \$500.00 from Mr. Kadlec? A. Yes, sir.

Q. What did you do with that money?

A. That money is in the Sockeye.

Q. Mr. Doss Payne who was formerly a libelant in [388] this action gave you \$2500.00. What was done with that?

A. It is in the Sockeye.

Q. Did you ever buy the Sockeye?

A. I had a purchase agreement and equity in it.

Q. I asked if you ever bought the Sockeye?

A. No.

(Testimony of Robert J. Tobin.)

Q. Did you ever represent to Mr. Kadlec that you owned the Sockeye? A. No, I did not.

Q. Do you have before you your contract with Mr. Kadlec? A. Yes, I do.

Q. Read the caption of that contract?

A. (Reading): "Working Share and Contract on Boat or Boats Owned and Operated by R. J. Tobin."

Q. This contract has to do with the Sockeye?

A. Yes.

Q. Would you read clause 1 of that contract?

A. (Reads cause one of Respondents' Exhibit A-10.)

Q. And the last line is "fishing boat Sockeye or tuna Boat, owned by the first party"? A. Yes.

* * * * * [389]

Q. Now, you say you had an agreement to purchase the Sockeye. Was that agreement signed by both owners of the Sockeye?

A. I do not know.

Q. Did you know that one of the owners of the Sockeye was in Norway? A. No, I did not.

Q. Did you ever receive a bill of sale for the Sockeye? A. No, I did not.

Q. Where is the Sockeye now?

A. I do not know. * * * * * [390]

Q. Have you transferred your equity or sold whatever interest you may have had in the Sockeye—and I am honest to say I don't understand what interest you do have?

(Testimony of Robert J. Tobin.)

A. Yes. I have a contract and note. When the boat is sold, I am to receive \$2600.00. * * * * *

The Court: We will take a noon recess.

(At 12:05 o'clock p.m., Friday, September 17, 1954, proceedings recessed until 2:00 o'clock p.m., Friday, September 17, 1954.) [391]

Seattle, Wash., Sept. 17, 1954, 2:00 o'clock p.m.

The Court: You may proceed. * * * * *

Q. (By Mr. Crutcher): I am concerned here with Mr. Kadlec. You took \$500.00 of his money on the basis of a contract wherein you stated you were the owner of the Sockeye? [392]

A. Yes.

Q. What right did that payment give him in the Sockeye?

A. As his contract stated, one third of the share of the catch of fish.

Q. He was to fish on the vessel, is that correct?

A. Yes.

Q. Now, what happens when the vessel does not work, in other words, when there is no use of the vessel? Is Mr. Kadlec unemployed?

A. Every one is unemployed, yes.

Q. When Mr. Kadlec went on board the Silver Spray, did you give him any duties to perform there? A. No specific duties.

Q. Well, Mr. Kadlec has testified that he stood watch as helmsman and as assistant engineer, is that correct? A. Yes.

(Testimony of Robert J. Tobin.)

Q. During such time was he under the discipline of the captain? A. Yes.

Q. What sort of compensation was Mr. Kadlec entitled to by reason of those services, if any, on the Silver Spray? A. None whatsoever.

Q. In other words, Mr. Kadlec was volunteering [393] his services for the Silver Spray, is that correct? A. Yes, sir.

Q. Did you have a clear understanding with him to that effect? A. Yes, I did. * * * * *

Q. Under the terms of this contract, if these people were not your employees, what were they?

A. Sharers in the venture.

Q. What sort of venture are you referring to?

A. The tuna fishing venture.

Q. Where was this tuna fishing venture to be carried out? A. In Southern waters.

Q. Now, I will revert to my original question. What was the purpose of the money which these people gave to you at the time they signed their contracts with you?

A. To outfit, provision and operate the Silver Spray. * * * * * [395]

Q. Now, Mr. Kadlec gave you \$500.00. You have already testified that the money which you yourself put into the venture went into the purchase of what you yourself described as an equity in the Sockeye. What happened to Mr. Kadlec's money?

A. The money coming back from the sale of the Sockeye which I am to receive and have not

(Testimony of Robert J. Tobin.)

received from Mr. Flagler was to go to Mr. Kadlec and Mr. Payne. [396]

* * * * *

Q. Now, when did you commence doing business on behalf of the Silver Spray after you came back from Spokane to Seattle?

A. If it was a Saturday, it would have been a Monday morning.

Q. Which would be April 26, I believe?

A. Yes.

Q. What did you do while you were here in Seattle that first day which related to the operation of the Silver Spray?

A. I was around town, Seattle, gaining what information I could about getting us outfitted and getting us South as fast as possible. [398]

* * * * *

The Court: How did you get this idea of selling these contracts and getting these \$2500.00 sums?

Witness: The only way I could see at the price and the cost of boats and their high operation,—there are a number of fellows like myself who want to fish but could not afford to go into an expensive high-priced boat and outfit it, where, if a group were in it, it would be possible to do so. [403]

* * * * *

The Court: Were you correspondingly concerned [404] about the outturn of the expense being caused to the persons planning to become fishermen from each of whom you took this contribution of \$2500.00? Did that give you any concern?

(Testimony of Robert J. Tobin.)

Witness: Yes, sir, it did, very much so, and I told the fishermen, the shareholders, that we had three alternatives with the boat. If we had bad fishing, the possibilities I could see for it were charter work or freight work for the boat.

The Court: You say you had never handled any boats before?

Witness: No, sir, just a small troller in Alaska. I had no knowledge of this big a boat. [405]

* * * * *

Q. (By Mr. Crutcher): Did you run an advertisement in the April 23rd issue of the Seattle Times? A. Yes, I did.

Mr. Crutcher: If I may take just a single sheet from this newspaper——

(Discussion.)

The Clerk: Libelants' Exhibit No. 3.

(Sheet of Newspaper marked Libelants' Exhibit No. 3 for identification.)

Q. (By Mr. Crutcher): Mr. Tobin, will you kindly refer to Libelants' Exhibit No. 3, to the newspaper advertisement on page 36 which is outlined in red and state to the Court whether that [407] is the advertisement referred to by you in your answer to the last question? A. Yes.

Mr. Crutcher: I offer that in evidence.

Mr. Collins: No objection.

The Court: It is admitted.

(Libelants' Exhibit No. 3 received in evidence.)

* * * * *

(Testimony of Robert J. Tobin.)

Q. Then when you ran an advertisement in the Seattle papers on May 29 and 30, you did know about the bait tanks and refrigeration?

A. I don't know whether I did or didn't at that time.

Q. Did you run an advertisement in response to which Mr. Bunker came to see you in your hotel room June 2nd? A. Yes.

Q. Was that the advertisement which referred to Mr. Gehrig as your business agent?

A. Yes.

Q. At that time then you did know, did you not, that bait tanks and refrigeration were requisite to large scale tuna fishing? A. Yes.

Q. Did you discuss either bait tanks or refrigeration with Mr. Bunker?

A. Yes, I did. [415]

* * * * *

Q. On the morning of June 3, when you talked with Mr. Lower and Capt. Moore, did you say anything to them about going on South for tuna fishing with the vessel? A. Yes, I did.

Q. What did you say to them?

A. I asked Mr. Lower if he wanted to go South for tuna; that Capt. Moore was coming off; Mr. Bunker was staying on; that Capt. Moore was going North. Mr. Lower then said: "I would prefer to go North with Don Moore."

Q. How were you planning the trip North, on what vessel?

A. That was prospective in regards to Mr. Geh-

(Testimony of Robert J. Tobin.)

rig. He sold me on the idea a very good living could be made from having a boat chartered and running North with hiring out to these places, hauling stuff like, oh, they had construction out here they wanted to—Mr. Payne was also interested in that—and they approached me with it, about taking down these apartment houses you buy, these Government apartment houses, and moving them to the North on the boat, and building them.

Q. Were you planning to use the Silver Spray in that trade? A. No.

Q. Then, on the morning of June 3, you still intended to take the Silver Spray South for tuna fishing? [416] A. Yes, I did.

Q. And you were in urgent hurry to do that?

A. I wanted to do that, yes.

Q. The tuna fishing season was already well advanced, was it not?

A. No, I don't believe so. Mr. Overman told me that there would be no rush to get down before June 21st.

Q. So on the morning of June 3rd you still planned to go tuna fishing? A. Yes, I did.

Q. Where did you go on the night of June 3rd?

A. I went to Spokane.

Q. What was the purpose of that visit?

A. My daughter was ill.

Q. How long did you stay in Spokane?

A. I returned the following Monday.

Q. That was on June 7? A. Yes.

(Testimony of Robert J. Tobin.)

Q. In the meantime, had you made any arrangements for the voyage South?

A. The arrangements I made at that time were for the boat to go to drydock.

Q. With whom did you make those arrangements?

A. Mr. Gehrig, Mr. Moore, and Mr. Lower.

Q. What arrangements were made for provisioning [417] the vessel?

A. I didn't put provisions on at that time because there would be no necessity of putting provisions on until it came out of drydock because everybody would be gone home.

* * * * *

Q. Now, you have testified that on June 4, while you were in Spokane, you went to see an attorney after receiving a telephone call from Mr. Gehrig?

A. Yes.

Q. What was the occasion of calling on the attorney?

A. Mr. Gehrig explained to me that the shareholders wanted to take over the boat and I had better consult an attorney.

Q. Now, what happened between the morning of June 3 and June 4 which caused this remarkable change of plans or events?

A. That I do not know.

Q. Is it your position now that as of June 7 you were still planning to immediately take the vessel South for tuna fishing? A. Yes. [418]

Q. Mr. Barquist has testified that when he asked

(Testimony of Robert J. Tobin.)

you what your plans were or "What do we do now", you said: "Let's go to my attorney and you will get your money." Is that testimony true or false?

A. Part of it is false; part of it is true.

Q. Will you explain?

A. Yes, I will. At that time it was, as I explained in earlier testimony, there was confusion in there, and I was frightened, and I asked them to go to my attorney with me, and that is where we went, Mr. Swontkoski's office.

* * * * *

Q. If you then were planning on immediately leaving for the South to go tuna fishing, why was there all this disturbance on board?

A. That I do not know. [419]

* * * * *

Q. Was there any agreement between yourself and Mr. Lower as to when and under what circumstances the \$2500.00 would be returned to him?

A. According to the contract?

Q. Well, I mean your understanding with him, either by reference to the contract or without it?

A. Yes. My understanding with Mr. Lower was that if he would give me 30 days' notice and an additional 90 days, I would give him this money back.

Q. So 120 days from the day he decided to quit the vessel, the employment of the vessel, he would get his money back, is that correct? A. Yes.

Q. And the use of the money by yourself was

(Testimony of Robert J. Tobin.)

the consideration under which he was entitled to work aboard the vessel, is that correct?

A. Yes. [422]

* * * * *

Q. It is possible, is it, that some one could pay you the \$2500.00 and sit at home and receive his share?

A. Oh, absolutely not, no.

Q. In other words, he had to be working for you in order to be entitled to his share of the catch?

A. Yes.

* * * * *

Q. Was there some condition under which they would forfeit the \$2500.00?

A. No, sir. Mr. Lower did not comply with the agreement and tied up the boat so it was unable to do anything.

Q. Did he forfeit his right to the return of his \$2500.00?

A. Well, I believe he should; he tied the vessel up. [423]

* * * * *

Mr. Crutcher: I have concluded. Mr. Armstrong has a couple of questions he would like to ask.

Cross Examination

Q. (By Mr. Armstrong): Mr. Tobin, when you discussed with Mr. Peecher in Ketchikan, Alaska, his leaving the vessel, was that discussion relative to Mr. Peecher's permanently leaving the vessel or was it temporarily because of his arthritis?

(Testimony of Robert J. Tobin.)

A. I believe it was permanent leave of the vessel.

Q. Isn't it true that he asked you at that time to be permitted to come down to Seattle because of the weather in Alaska, and that he intended to go further with the vessel if it went to Southern waters?

Witness: Would you repeat that?

(Last question is read by the reporter.)

A. No. I don't know.

Q. How do you account for your letter to him on the 28th if that isn't true then, Mr. Tobin?

The Court: Are you familiar with your letter of the 28th?

Witness: Yes.

A. I felt that it was, oh, indefinite on his part and my part, both; that I didn't fully understand or he did [425] either, which was happening there.

* * * * *

Q. It was your thought when you left Alaska that if you had gone to Southern waters for tuna fishing that Mr. Peecher would have been on board? You fully expected that?

A. Yes. [426]

* * * * *

Q. And on June 3, did you have all of your personal belongings off of this vessel?

A. No, I did not.

Q. What other personal belongings did you leave on the vessel?

A. All my rain gear, blankets, gloves, miscellaneous clothing, overshoes.

(Testimony of Robert J. Tobin.)

Q. Necessary items you left on the vessel?

A. Yes.

Q. But you took off on June 3 what you considered your personal gear except for these few items?

A. Yes. I took my bedroll off.

Q. Did you take these additional clothes that you are speaking of off? A. Yes. [427]

Q. Did you take a radio off?

A. Yes. [428]

* * * * *

The Court: Why did you take that stuff off on that day?

Witness: So Mr. Bunker could move aboard and take over as captain and have the captain's quarters.

The Court: Were you intending thereafter to act as captain or have anything to do as one on board with the management of the vessel, with the navigation and work of the vessel?

Witness: Your Honor, I intended to go on ahead to California before the boat got there.

The Court: You say "so Mr. Bunker could take over"?

Witness: Yes. He was going to take over as captain and take the boat out. * * * * * [429]

Q. (By Mr. Armstrong): Did you advise any member or shareholder—when I refer to crew members, I am speaking primarily now and only of shareholders—did you advise any of those persons that you did not intend to be aboard this vessel

(Testimony of Robert J. Tobin.)

and travel with them to California for tuna fishing?

A. Yes, I discussed that.

Q. Whom did you tell that you did not intend to go?

A. Mr. Lower, at an earlier date.

* * * * *

Q. Is Mr. Lower the only person you discussed that with? [430]

A. May have been; may not have been. I do not recall.

Q. May I presume from your answer that this discussion was prior to the time you left for Alaska?

A. Yes.

* * * * *

Q. Did you have any further money when that vessel got back to Seattle, M. Tobin, to outfit it for fishing or to pay for any provisions to go to Southern waters?

A. Yes, I believe, recalling right now, I had around \$2,000.00. [431]

Q. All right. Now you told us that you received \$11,500.00 and it had cost you approximately \$6,500.00?

A. It couldn't have because I didn't have Mr. Bunker's.

Q. Isn't it true that part of Mr. Bunker's money went toward the cost of this venture in Alaska, to pay for some of the expenditures made up in Alaska by the vessel?

A. No, sir.

Q. Then you wish to correct your testimony? It did not cost you \$6,500.00 to make this Alaska venture?

A. That is right.

(Testimony of Robert J. Tobin.)

Q. How much did it cost you?

A. The lay-up caused by the crew members is what——

The Court: No. Just say what it cost you. Instead of \$6,500.00, if you think now it cost you some other sum, say what it was.

Witness: Approximately \$5,000.00.

Q. (By Mr. Armstrong): Then at the time you arrived in Seattle you had, according to your testimony, \$2,000.00 with which to proceed to California?

A. I do not know—at that time.

Q. Will you please give us your best estimate of how much money you had available?

A. I figured there was easily money to fully fuel, [432] put all supplies and stores aboard the boat.

Q. How much did you figure that would cost you? A. Oh, gee, I have no idea.

Q. Now, you just told us you figured it was fully enough. How much? You must have had some idea. You were here for three days, you said, talking about outfitting. How much was it going to cost you to take that boat tuna fishing?

A. Fueling would have cost around \$250.00 or \$300.00, alone, for fuel. Food would probably run in the neighborhood of \$300.00 or \$400.00.

Q. That would leave you some money left available when you arrived in San Diego, is that correct? A. Yes.

Q. Am I correct in presuming from your testi-

(Testimony of Robert J. Tobin.)

mony that when you arrived in California you intended to place bait tanks and refrigeration on board this vessel? A. If possible, yes.

Q. Did you make that representation to the other crew members who were shareholders and are these libelants?

A. For eventuality, yes. [433]

* * * * *

Q. Was this vessel represented to you by any one as being a tuna clipper prior to the time that you printed up your printed documents which you have in evidence here with these various libelants a sbeing your contract? * * * * *

A. Yes.

Q. By whom? A. Mr. Flagler.

Q. Who was Mr. Flagler?

A. He operates a boat sales office. [441]

* * * * *

Q. When did Mr. Flagler tell you this vessel was a tuna clipper? Did Mr. Flagler tell you at that time? A. Not at that time, no.

Q. At a later time? A. Yes.

Q. Did any further negotiations relating to the purchase of this vessel take place through Mr. Flagler? A. No. [443]

* * * * *

Mr. Armstrong: I have no further questions.

Cross Examination

Q. (By Mr. Allison): Mr. Tobin, did you not use the \$2500.00 which Mr. Herning paid to you

(Testimony of Robert J. Tobin.)

as part of the purchase price of this vessel, the Silver Spray? A. Yes.

Q. You used Mr. Herning's money and Mr. Lower's money, did you not, to pay down on the purchase of the vessel? A. Yes.

Q. Did you tell Mr. Herning you were going to use his \$2500.00 for the purchase of this vessel?

A. No.

Q. Did you have any discussions with Mr. Herning whatsoever about any other operation for the use of the Silver Spray other than tuna fishing?

A. Yes. We talked numerous operations. [446]

* * * * *

Q. Did you have a conversation over the telephone with Mr. Herning on the morning of June 3, 1954? A. Yes, I did.

Q. Have you had any contacts with Mr. Herning other than that telephone conversation since that date? A. No, I haven't.

Q. Mr. Herning has not made any demand upon you for the return of \$2500.00 or any other demand with the exception of this libel which he has filed?

A. That is right.

Q. You have not seen Mr. Herning since you left him in Alaska, is that correct?

A. That is right, yes.

Mr. Allison: That is all. [447]

* * * * *

Redirect Examination

Q. (By Mr. Collins): Were any conversations

(Testimony of Robert J. Tobin.)

had relating to the fact that your contracts called the vessel a clipper?

A. No. We had discussions.

The Court: You can ask him what his state of mind and purpose was regarding it. I think that is material, his state of mind as to deception.

Q. (By Mr. Collins): What was your purpose in designating it as a [449] clipper in the contracts? A. I thought it was a clipper.

Q. Did you have any intent to deceive any one by the use of the word? A. No.

* * * * *

Mr. Collins: I have no further questions. [454]

* * * * *

The Court: You may step down.

(Witness excused.)

JAMES T. GEHRIG

called as a witness by and on behalf of respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): State your full name, please. A. James Taylor Gehrig.

Q. Where do you live?

A. 4122 42nd N.E., Seattle. * * * * *

Q. By the way, you have no interest in this [455] litigation, have you?

A. None whatsoever, no. * * * * *

Q. Were you on board the vessel on the 5th or

(Testimony of James T. Gehrig.)

the 6th or the 7th? A. Yes. [456]

* * * * *

Q. Will you tell the Court about that occurrence and who was present?

A. I went aboard the vessel one afternoon—I think it was the day after the boat returned—and at that point there were a great many people mad at each other, and what I was trying to do was to settle the thing down to the point where the boat could continue to operate and so money could be made out of the operation.

Q. Well, who was mad at who?

The Court: If you know or observed.

A. Mr. Peecher was mad at me.

Q. What did Mr. Peecher have to say about tuna fishing? [457]

A. Mr. Peecher wanted to go tuna fishing.

Mr. Armstrong: I didn't understand that.

(Last question and answer are read by the reporter.)

Q. (By Mr. Collins): Who else was mad at who else? A. Mrs. Lower was mad.

Q. Who was she mad at?

A. Well, I assumed that Mrs. Lower was mad because she wouldn't talk to me, and I assumed she was mad at me.

* * * * *

Q. Well, what was the general situation?

A. The general situation was this: The boat comes back from Alaska. Tobin tells me he wants the boat to go to Southern waters for tuna fishing

(Testimony of James T. Gehrig.)

and tells me that he has advised Capt. Moore to prepare the boat for tuna fishing. I advised Mr. Tobin it would be a speculation to go tuna fishing at that date because I know nothing of tuna fishing myself.

The Court: Is that the reason you told him—why you so advised him as you just stated?

Witness: Yes, because I knew nothing of [458] tuna fishing myself.

A. (Continued) I had previously made a number of contacts whereby cargo could be taken from Seattle to Southern ports in Alaska, and it seemed to me at that time that a bird in the hand was worth two in the bush. In other words, I advised Mr. Tobin to take the cargo contracts that were available at that time rather than go tuna fishing.

Q. Some shareholders I assume then had differences of opinion with you?

A. I didn't discuss that with the shareholders.

Q. Well, coming back to this meeting where some shareholders were disturbed, did Mr. Tobin come aboard?

A. Mr. Tobin came aboard, yes, he did.

Q. Who was on board at the time?

The Court: If you can recall any more than you have already said.

A. I can recall Mr. Payne, Mr. Tobin, Mr. Peecher, myself, Mrs. Barquist and Mr. Barquist.

Q. Do you recall any conversation between Tobin and the Barquists at that time?

A. Mr. Barquist?

(Testimony of James T. Gehrig.)

Q. Yes.

A. No. I don't recall any conversation between the two of them.

Q. What was Mr. Barquist's attitude about the venture? [459]

A. Mr. Barquist was quite bitter toward Mr. Tobin.

Q. What did Mr. Barquist want to do?

A. Mr. Barquist wanted to retire from the venture and get his money back.

Q. And you said a moment ago Mr. Peecher wanted to go fishing?

A. Mr. Peecher indicated that to me, yes.

* * * * *

The Court: What was your connection with the vessel, if any?

Witness: My connection with the vessel was that I provided the insurance for the vessel. It was as an insurance agent. [460]

* * * * *

Q. Who was on board then, beside Peecher, Barquist, Payne and Tobin?

A. Don Moore was there and Mrs. Barquist.

Q. Was Mr. Lower present?

A. No. I think that Capt. Bunker was aboard at that time.

Q. Well, what was Mr. Bunker's attitude?

A. Capt. Bunker was, as far as my understanding was concerned, was to take the boat tuna fishing, and he was down there to assume responsibility for it.

(Testimony of James T. Gehrig.)

Q. And what was Tobin's disposition as to the tuna fishing venture? [461]

A. Mr. Tobin told me the boat was going tuna fishing.

Q. Was there what you might call a violent disagreement between any one and Mr. Tobin?

* * * * *

A. Mr. Peecher had been somewhat disturbed. He was considerably upset at me the day I went aboard. He lost his temper toward me. The same thing happened the night Mr. Tobin came aboard the Silver Spray, but I attributed that to a loss of temper and not being a violent thing.

Q. Well, what was the outcome of this meeting?

A. Well, the outcome of the whole thing was that I took Mr. Barquist, Mrs. Barquist and my partner at the time in my car, and we followed Mr. Tobin, Mr. Payne, and Capt. Moore from the wharf to Mr. Swontkoski's office with one stop on the way out there.

Mr. Collins: That is sufficient.

The Court: Any cross examination? [462]

* * * * *

Cross Examination

Q. (By Mr. Armstrong): Did you believe that if these people who were shareholders had had definite information from Mr. Tobin as to what that vessel was going to do, and especially that it was going to go tuna fishing as soon as it could be repaired, that there would have been any dissension among them? [465]

(Testimony of James T. Gehrig.)

A. The men on the boat, when it came back here, knew that the boat was going tuna fishing.

The Court: Mr. Gehrig, could you gather from all that occurred in your presence what it was that was the principal cause of the disturbance, and what it was that they were displeased with? What kind of a policy, if any, of the boat's management were they displeased with?

Witness: I can't answer that, Your Honor.

The Court: Were you not able to learn on that occasion what it was that was causing trouble?

Witness: I was very close to Mr. Tobin. I was very close to all the individuals on the boat. Mr. Tobin told me that the boat was going tuna fishing. He sent a telegram to the boat in my presence for the attention of Mr. Lower.

The Court: That was at Ketchikan, was it not?

Witness: Yes.

The Court: That is not the time we are talking about. We are talking about the time the boat returned from Alaskan waters on or about the 7th of June when there was some dissension on the boat and when you said a lot of people were mad at each other or at somebody.

Witness: Yes, they were. [466]

The Court: What was it on that occasion, if you knew or were able to tell then, that was the central core of that irritation?

Witness: The central core of the irritation, Your Honor, came from the men not understanding what was going on.

(Testimony of James T. Gehrig.)

The Court: You may inquire.

Mr. Armstrong: I have no further questions.

Cross Examination

Q. (By Mr. Crutcher): On the night of June 7, were you present at that meeting, the Monday following the week in which the vessel arrived back in Seattle?

A. Well, that was the occasion when Mr. Tobin came aboard. Yes, I was there.

Q. Were you instrumental in getting Mr. Tobin to come back from Spokane to Seattle for that meeting?

A. I tried very hard to get Mr. Tobin to come back for the meeting.

Q. By long distance telephone calls?

A. Several.

Q. Now, at that meeting, did you hear Mr. Barquist ask Mr. Tobin what he planned to do?

A. Mr. Crutcher, I don't recall that if he asked [467] him; I don't know.

Q. Did any one ask Mr. Tobin what he planned to do with the vessel?

A. I believe several people did.

Q. And what did Mr. Tobin say?

A. "See my attorney."

Mr. Crutcher: I have no other questions.

Mr. Allison: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Collins: The respondents subpoenaed Capt. Moore.

The Court: If Capt. Moore is present, please come forward.

(No response.)

Mr. Collins: If not, we rest.

The Court: The respondents rest. Any rebuttal?

* * * * * [468]

HARRY C. LOWER

called as a rebuttal witness by and on his own behalf, having been previously sworn, was examined and testified further as follows:

Direct Examination

* * * * *

Q. (By Mr. Crutcher): Do you recall the conversation which you had with Mr. Tobin at his home in Spokane on April 17, 1954?

A. Most of it, yes.

Q. Can you state to the Court whether, at this time, you recall whether Mr. Tobin told you he owned the vessel Silver Spray or not?

A. Yes. He said: "I own that vessel. That is my vessel." He showed me a picture.

Q. Did he say anything about a purchase contract? A. Not that I remember, no. [469]

* * * * *

GEORGE S. HERNING

called as rebuttal witness by and on his own behalf, having been previously sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Allison): Mr. Herning, when you discussed the purchase of this share with Mr. Tobin on April 27, did he state to you that he owned the Silver Spray at that time? A. He did.

Q. He did? A. Yes.

Q. Now, Mr. Herning, did you ever discuss with Mr. Tobin at any time any venture other than tuna fishing? A. No, I did not. [470]

* * * * *

The Court: You may proceed, Mr. Carey, with the case in chief of intervening libelants Putnam and Overman.

Mr. Carey: It is stipulated between the respondent Tobin, as owner, and Putnam and Overman, mortgagees, that the preferred ship mortgage described in the Putnam and Overman intervening libel is a valid, subsisting, preferred mortgage, and that the defaults have occurred as alleged in that intervening libel. Is that correct, Mr. Collins?

Mr. Collins: That is correct.

Mr. Carey: It is stipulated between the intervening libelants Putnam and Overman, as mortgagees, and the various shareholders represented by Mr. Crutcher, Mr. Armstrong, Mr. Allison and Mr. Wells that the preferred ship mortgage described in the Putnam and Overman intervening libel is

a valid, subsisting mortgage subject to the priority of any [471] maritime lien that may be found to have been proven by the evidence that, as a matter of law, are superior to that preferred ship mortgage, is that correct, gentlemen?

Mr. Crutcher: Yes.

Mr. Armstrong: Yes.

Mr. Allison: Yes.

Mr. Wells: Yes.

Mr. Carey: It is further stipulated by all counsel that the matter of attorney's fee to be allowed for the foreclosure of the mortgage shall be left to the discretion of Your Honor, if Your Honor will assume that obligation.

The Court: I will hear some statement about what work was done if counsel cannot agree upon what the fee should be. Also, I wonder if you should not file in the records and introduce in evidence as an exhibit the original note and mortgage.

Mr. Carey: I was just going to do that. The mortgage and note should be taken out of circulation.

The Clerk: Libelants' Exhibit 4.

(Preferred Mortgage marked Libelants' Exhibit 4 for identification.)

Mr. Carey: That is the ship's mortgage. I now [472] offer note dated April 28, 1954, being a note stipulated to be in default.

The Clerk: Libelants' Exhibit 5.

(Note marked Libelants' Exhibit 5 for identification.)

The Court: Do you offer each of these exhibits?

Mr. Carey: Yes, Your Honor.

The Court: Libelants' Exhibit 4, denominated "Preferred Mortgage" is offered. No objection being stated, it is now admitted.

(Libelants' Exhibit 4 received in evidence.)

The Court: Has any one any objection to Libelants' Exhibit 5, which purports to be the original note for the sum of \$30,000.00? There being no objection, that is now received in evidence.

(Libelants' Exhibit 5 received in evidence.)

Mr. Carey: I now offer, with the consent of counsel, a "Certificate of Ownership" of the vessel dated August 23, 1954, certified by the Collector of Customs. [473]

The Clerk: Libelants' Exhibit 6.

(Certificate of ownership of vessel marked Libelants' Exhibit 6 for identification.)

The Court: Is there any objection to its offer? It is admitted.

(Libelants' Exhibit 6 received in evidence.)

Mr. Carey: That is all, Your Honor. We rest.

* * * * * [474]

The Court: This case is continued for further trial proceedings on the merits, including arguments on the merits, to the afternoon of Monday, October 11, at 2:00 o'clock p.m.

(At 4:45 o'clock p.m., Friday, September 17, 1954, proceedings recessed until 2:00 o'clock p.m., Monday, October 11, 1954.) [475]

Seattle, Wash., October 18, 1954, 10:00 o'clock a.m.

The Court: May I ask counsel in the Silver

Spray case, the Court being again in session, if you are ready to proceed with the argument of that case on the merits?

All Counsel: Yes.

(Discussion concerning the allotting of time for argument.)

(Arguments made by proctors on behalf of libelant, additional libelants, additional intervening libelants, and respondents.)

The Court: As to the intervening libelant Kadlec, notwithstanding the form of his libel and the statements therein contained, he proved a contract for a specific wage, and he worked and earned a specific wage upon the agreed compensation of \$100.00 per week. While it might be argued that [476] there was some five and one-half weeks time involved, I think the more certain proof as to time would be five weeks, and so from a preponderance of the evidence the Court finds, concludes and decides as to that intervening libelant that he entered upon agreement with the respondent Tobin that he, Mr. Kadlec, should be employed and he was employed on a vessel of the respondent Tobin, to wit, the Silver Spray, at the agreed specific wage of \$100.00 per week, and that he worked for five weeks, entitling him to a decree in this case that he has a maritime lien for seamen's wages for that length of time; that the lien is against the vessel the Silver Spray; that he is entitled to have the vessel condemned and sold and to receive from the proceeds thereof his costs in this action to be taxed and to further have out of such proceeds his wages

so adjudged to be due him for said five week period at \$100.00 per week.

Further, the Court so finds, concludes and decides that the intervening libelant Kadlec never effectually entered into any agreement to work for the respondent Tobin on the Silver Spray or elsewhere upon any fisherman's lay contract.

In respect to the libelant and the other [477] intervening libelants in this action, the Court from a preponderance of the evidence does find, conclude and decide as follows:

That of such causes of action as the libelant and intervening libelants had on June 7, 1954, one such cause of action was for the recovery of damages to the extent of the value on that date of libelant's and intervening libelants' share in the prospective fishing catch of the Silver Spray equipped as a fresh bait tuna fishing boat and tuna clipper for the fishing season of 1954, and on that cause of action the libelant and intervening libelants sued in their libels.

It is possible that such libelant and intervening libelants also had on that day a cause of action at common law against respondent Tobin for fraud and deceit or some other action at law, but on that date such libelant and intervening libelants were not required against their choice to sue upon such causes of action at law, and they did not do so.

The mere fact that on cross examination one or more of them may have given testimony tending to evidence a cause of action at law does not in this case prevent the libelant and intervening [478]

libelants from disavowing any request or intention of request for any relief in this admiralty court on any such cause of action at law, and each and all of such libelant and intervening libelants have effectually disavowed any such intent through their counsel who have a right to speak for them.

From a preponderance of the evidence in this case, the Court finds, concludes and decides further that, upon the authority of *Carbone vs. Ursich*, 209 F2d 178, among other authorities, libelant and intervening libelants on June 7, 1954 had a valid cause of action in rem against the vessel *Silver Spray*, her engines, tackle, apparel, furniture and equipment, and also in personam against Robert J. Tobin for damages to the extent of the then value of the share of each of said libelant and intervening libelants in and to the prospective tuna fish catch of the *Silver Spray* as a tuna clipper, as a fresh bait tuna fisher, for the season 1954; that such right was secured by a maritime lien at that time, namely, June 7, 1954, against the vessel *Silver Spray*, her engines, tackle, apparel, furniture and equipment; and that the nature and rank of such lien was one for seamen's wages and has a rank superior to the maritime lien of the [479] preferred ship mortgage which is involved in the intervening libel of intervening libelants Putnam and Overman; that the value of such share in such prospective season's fish catch is the sum of \$7500.00, for which amount each libelant and intervening libelant has a maritime lien against said *Silver Spray*, her engines, tackle, apparel, furniture and equipment, and

also has a right in personam against Robert J. Tobin, the respondent;

That the respondent Robert J. Tobin abandoned the contract of employment of libelant and intervening libelants and also the fishing voyage on said 7th day of June, 1954; that at all times prior thereto and subsequent to the date of the lay fishing agreement of each of such libelant and intervening libelants respectively, they and each of them were ready, able, and willing to perform said lay fishing contract on their and each of their parts to be performed; and that the abandonment of the said fishing voyage and of said lay fishing contract by the respondent Robert J. Tobin, the owner and operator of said Silver Spray, was through no fault of either of such libelant and/or intervening libelants.

That in respect to said sum of \$7500.00 [480] adjudged to be due and owing to each of said libelants and intervening libelants and for which each of them has a valid and subsisting maritime lien against the said vessel, her engines, tackle, apparel, furniture and equipment, they are entitled to have such vessel and her engines, tackle, apparel, furniture and equipment condemned and sold and the proceeds thereof applied, first, to the maritime liens of each of such libelant and intervening libelants in this action and to the payment of costs and disbursements properly taxable as costs in this action.

That the said maritime lien of each of such libelant and intervening libelants is superior to the maritime lien of the preferred mortgage of inter-

vening libelants Putnam and Overman in this action

That the intervening libelants Fred I. Putnam and James A. Overman, as mortgagees under the preferred mortgage in this case, have a preferred mortgage lien and a maritime lien against said vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, and in personam against Robert J. Tobin for the sum unpaid, as to which I ask counsel to state the exact amount [481] computed as of the date when judgment and decree are to be entered, to secure the obligation of said Robert J. Tobin and said vessel and her engines, tackle, apparel, furniture and equipment, to pay the sum and the installments thereof unpaid under a certain promissory note which is of record in this case; and that such maritime lien is validly against said vessel and her engines, tackle, apparel, furniture and equipment superior in rank to all maritime or other liens of every name and nature against said vessel and her said engines, tackle, apparel, furniture and equipment, excepting only the maritime liens herein foreclosed of the above-mentioned John Kadlec and each and all of the other libelant and intervening libelants in this case; and that as to said maritime lien of said intervening libelants Putnam and Overman against said vessel, her engines, tackle, apparel, furniture and equipment, they are entitled to have such vessel, her engines, tackle, apparel, furniture and equipment condemned and sold and the proceeds of her sale applied to pay the amount of such claim and

claims of said intervening libelants Putnam and Overman under and by virtue of [482] said promissory note and preferred ship mortgage, subject, however, to prior full and complete payment of the claims in the amounts herein found due of the libelant and said intervening libelants and said Kadlec, and provided that if, after the payment of such claims and the taxable costs of such libelant and intervening libelants and said Kadlec in full, there are any remaining proceeds of sale, then the remainder of any proceeds of such sale of said vessel, her engines, tackle, apparel, furniture and equipment, shall be applied next to the payment of the claims and costs herein awarded in favor of said intervening libelants Putnam and Overman.

It is further so found, concluded and decided that for any unpaid sum in this decision found due and owing to said Kadlec and such libelant and other intervening libelants, and also to said intervening libelants Putnam and Overman, or any of them, after applying such sale proceeds to payment of such claims in accordance with the order of their superiority in rank as heretofore announced in this decision, then any deficiency so remaining unpaid shall be paid by said respondent Robert J. Tobin to such of said claimants as [483] so remain unpaid.

Is there any issue tendered in this case not decided by the Court's orally announced decision?

Mr. Carey: Yes.

Mr. Crutcher: Yes, Your Honor. There is a counter-claim asserted as a so-called third affirma-

tive defense of wrongful attachment of the vessel.

The Court: The Court finds, concludes and decides that there was no wrongful attachment of the vessel by the libelant or any one of the intervening libelants; that the right of action of such libelant and intervening libelants had already arisen and the right to sue had already arisen at least three days before the libels of such libelant and intervening libelants were filed. [484]

And now your question, Mr. Carey.

Mr. Carey: Your Honor overlooked a very important matter.

The Court: I am very anxious not to end this hearing without disposing of everything.

Mr. Carey: The matter of allowing attorney's fees for the foreclosure of the preferred ship mortgage.

The Court: Does any one else think of any other issue overlooked?

Mr. Collins: I might suggest that the findings should probably deny our claim of \$100.00 loss of use per day since the seizure.

The Court: The Court believes that that should be done, and the Court finds, concludes and decides that the claim of the respondent Tobin in the nature of demurrage or detention of the vessel to the extent of \$100.00 a day——

Mr. Collins: That was the claim. Of course, I am not agreeing to it. I am just suggesting it. In keeping with Your Honor's theory, it should be put in, I think.

The Court: (Continued) ——is not valid and

should not be allowed, and that said respondent Tobin take nothing by his affirmative defenses and [485] counterclaims asserted by him in this action.

The Court further finds, concludes and decides that the sum of \$ (Later set at \$2500.00) is a reasonable sum to be allowed to Mr. Stephen V. Carey as proctor for said Fred I. Putnam and James A. Overman, the mortgagees and additional intervening libelants in this action for his services in connection with the foreclosure of said mortgage.

Will you, Mr. Carey, advise the Court for the Court's convenience at this time what did you ascertain to be the final amount by the computations you have made up to this time due to your clients under that note and mortgage?

Mr. Carey: Well, I haven't made the computation, Your Honor.

The Court: Do you know what it is approximately?

Mr. Carey: Just a moment, Your Honor.

(Mr. Carey confers with Messrs. Putnam and Overman.)

Mr. Carey: The face of the note is \$30,000.00, and there is approximately \$750.00 interest accumulated.

The Court: And there has been nothing paid on principal? [486]

Mr. Carey: No.

The Court: Have counsel talked together and given each other the benefit of their suggestions about what would be a reasonable sum for attorney's fees in this case?

Mr. Carey: No. I haven't discussed it with anybody.

Mr. Crutcher: I would suggest that that could be appropriately done between now and the time we appear for the signing.

Mr. Carey: We agreed to leave it with Your Honor, and I am perfectly willing to leave it there. If counsel wants to make some suggestions, I have no objection to the making of suggestions, but I am not going to bargain with the opposition.

The Court: The only way I would welcome suggestions from one would be to have suggestions from both sides.

Mr. Carey: Well, I have no objections to the making of suggestions.

(At this time discussion was had relative to the legal services performed by Mr. Carey on behalf of the intervening libelants Putnam and Overman.) [487]

Mr. Carey: My own judgment is that \$2500.00 would be a proper fee for such services.

The Court: Any objection to that?

Mr. Crutcher: I think that is just about right.

The Court: That is what I think.

The reporter in the notes already made by the Court where the place is left blank as to the amount of the attorney's fee will fill in there the sum of \$2500.00.

Now, were there any other issues which counsel for libelant and intervening libelants wish to mention as not having been disposed of by the Court's orally announced decision up to this time?

Mr. Crutcher: One matter, may it please the Court, is evidence in the case which tends to show that as to each of the six crew member libelants, except Kadlec to whom it does not apply and Peecher,—there is evidence of earnings——

The Court: The Court, of course, requires that credit be given on these claims adjudged due and owing for the amounts already received on account of their lay fishing contract by the libelant and intervening libelants,—— [488]

Mr. Crutcher: I assumed Your Honor did, but——

The Court: (Continued) ——and the correct amounts of the lien claims are to be finally determined by ascertaining the remainder after such deduction or credit.

Mr. Crutcher: I have those figures in our brief.

The Court: Well, I wish you to have them put in the proposed findings of fact, conclusions of law and judgment and decree, which are to be proposed in this case.

Is there any other detail not covered?

Now, if that is all, I wish to indulge your time just for a moment to state one or more reasons why the Court has adjudged valid and superior in rank these fishermen's claims as maritime claims against the vessel, etc.

It is true that in a case of a labor contract where the issues between the lay fishermen on the one hand and the ship on which they were employed and the owner of that ship on the other hand, on this question of whether or not the share of the

prospective catch not yet realized the fishermen have a maritime lien for damages for [489] unpaid wages or have a seamen's work contract maritime lien of that kind, it seems to the Court from the best I can learn from the briefs and also from the Court's own search that there is not a Ninth Circuit or Supreme Court case already decided absolutely in point.

I feel certain, however, that the right of fishermen seamen for unpaid expected work liens against their fishing vessel under an express work contract is no less than that against another vessel not a party to the labor contract for a maritime tort lien such as that involved in the Carbone case reported in 209 F. 2d 178, and the conclusion that there is a valid maritime lien for such unpaid expected work of the rank attributed to it in this Court's decision now made in this case is one which comes a fortiori from the Carbone case approval of a maritime tort lien claim against a stranger vessel respecting in part the same kind of a claim as that involved in this case, namely, a claim for the present value of each share of the fishermen seamen in the prospective season's fish catch.

The circumstance in the Carbone case that only five days prospective catch may have been [490] involved is no different in principle than if a five months prospective catch or the whole 1954 tuna season's catch had been involved.

However, Judge John Parker's dissent in the Fourth Circuit case of *Old Point Fish Co. vs. Hay-*

wood, 109 F. 2d 703, is a strong supporting pillar which cannot properly be overlooked when considering what the opinion of the Ninth Circuit Court of Appeals is or may be on this question, although the majority ruling in the Haywood case is against this Court's decision.

The Ninth Circuit Court of Appeals has said in the Carbone maritime tort lien case that there is a lien for that kind of an interest which is here involved, and this Court cannot believe that the Ninth Circuit Court of Appeals will refuse to apply the rule announced in the Carbone case to the facts and cause of action in the case at bar involving breach of seamen's work contracts for lay shares of the prospective 1954 tuna fishing season's catch of the vessel which is held by this Court to be subject to a maritime lien for the cause of action stated.

When will counsel wish to present findings of fact, conclusions of law, judgment and decree [491] in this matter?

The vessel is still in the Marshal's custody as I understand it and I imagine is accumulating day to day costs.

Mr. Crutcher: We would like to be in a position to present that some time late this week, Your Honor, if we can, possibly Thursday.

(Discussion was had relative to the setting of a date for the entering of findings of fact, conclusions of law, judgment and decree.)

Mr. Crutcher: Would this be agreeable to Your Honor, if our findings and conclusions and proposed form of decree are prepared and served by

Monday and lodged with the Court on Monday, might we have the matter noted for Wednesday, the 28th of October?

The Court: I prefer it on the 28th. Any objection?

Mr. Collins: No objection.

Mr. Wells: I will respectfully say that I will be involved in a mal-practice action in Superior Court on the 26th. However, long before the matter has come into Court I will have looked at the findings prepared and will authorize Mr. Crutcher to speak for me. [492]

The Court: Is that agreeable?

Mr. Crutcher: Quite agreeable.

The Court: I wish to invite all counsel to be present if that is possible and I assure you that your presence will be helpful to the Court, but if any one of counsel on the side of the fishermen presents approved forms of the papers to be entered by the Court and is then authorized to speak for all, the Court will not feel that it is out of order for you to be absent. I take it from the fact that Mr. Crutcher has borne the laboring oar more or less that he will try to be here.

Mr. Crutcher: I will, Your Honor.

The Court: Then on the other side, I hope that both counsel can be present. Do you anticipate any conflicting appointments on that day?

Mr. Collins: I do not, Your Honor.

Mr. Carey: I don't.

The Court: It is then set for ten o'clock in the

forenoon on October 28th. Until then, those connected with this case are excused.

I ask you to provide for condemnation and sale of the vessel and the paying out of the proceeds on those libels and intervening libels to [493] lien claimants in harmony with the foregoing, that is, I wish the provisions as to validity and rank of liens and as to condemnation and sale of the vessel and distribution of proceeds of sale upon the libel of the intervening libelants Putnam and Overman to be repeated to the same effect as stated in respect to the fishermen libelant and intervening libelants.

Mr. Carey: Very well, Your Honor.

(At 2:40 p.m., Monday, October 18, 1954, trial proceedings concluded.) [494]

[Endorsed]: Filed December 21, 1954.

[Endorsed]: No. 14645. United States Court of Appeals for the Ninth Circuit. Fred I. Putnam and James A. Overman, Appellants, vs. Harry C. Lower, John Kadlec, George S. Herning, Edgar L. Peecher, William E. Barquist and Norman L. Bunker, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: February 7, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Endorsed]: No. 14645. United States Court of Appeals for the Ninth Circuit. Fred I. Putnam and James A. Overman, Appellant, vs. Harry C. Lower, et al., Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: April 12, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14645

FRED I. PUTNAM and JAMES A. OVERMAN,
Appellants,

vs.

HARRY C. LOWER, et al., Appellees.

The Oil Screw SILVER SPRAY, etc., et al.,
Respondents.

STIPULATION ON EVIDENCE, ISSUES AND
PLEADINGS ON APPEAL

It Is Stipulated between the undersigned proctors
for the respective parties to this appeal as follows:

* * * * *

4. That the proof of mitigation of damages by

the respective libelant crew members sustains the finding of fact thereon, being Finding XXII, and that the testimony pertaining thereto is not relevant to the appeal.

* * * * *

Dated this 4th day of February, 1955.

PEYSER, CARTANO, BOTZER &
CHAPMAN,

/s/ By VERNON H. BOTZER,
Proctors for Appellants

* * * * *

[Endorsed]: Filed Feb. 7, 1955. Paul P. O'Brien,
Clerk.

**United States Court of Appeals
For the Ninth Circuit**

FRED I. PUTMAN and JAMES A. OVERMAN, *Appellants*,

vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE S. HERNING,
EDGAR L. PEECHER, WILLIAM E. BARQUIST and
NORMAN L. BUNKER, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

WILLIAM H. BOTZER

PEYSER, CARTANO, BOTZER & CHAPMAN
Proctors for Appellants.

1415 Joseph Vance Building,
Seattle 1, Washington.

United States Court of Appeals
For the Ninth Circuit

FRED I. PUTMAN and JAMES A. OVERMAN, *Appellants*,

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INDEX

	Page
Statement of Jurisdiction.....	1
Jurisdiction of the District Court.....	3
Jurisdiction of the Court of Appeals.....	3
Statement of the Case.....	3
Specification of Errors Relied Upon.....	11
Argument	13
A. Jurisdiction	14
B. Appellees' Liens Are Invalid.....	19
C. Damages Were Not Proven.....	23
D. Kadlec Had No Wage Agreement.....	26
Conclusion	29

TABLE OF CASES

<i>Bromfield Mfg. Co. v. The Brown, Smith & Jones, et al.</i> , 117 F.Supp. 630 (D.C. Mass.).....	20
<i>Carborne v. Ursich</i> , 209 F.(2d) 178 (9th Cir.).....	22
<i>Carolene Sales Co. v. Canyon Milk Products Co.</i> , 122 Wash. 220, 210 Pac. 366.....	25
<i>Catarau v. Sunde & d'Evers Co.</i> , 188 Wash. 592, 63 P.(2d) 365.....	25
<i>Home Insurance Company v. Merchants Transportation Company</i> , 12 F.(2d) 931 (D.C., Wash.)	18
<i>Home Insurance Company v. Merchants Transportation Company</i> , 16 F.(2d) 372 (9th Cir.).....	18
<i>Lockit Cap Company v. Globe Mfg. Co.</i> , 158 Wash. 183, 290 Pac. 813.....	25
<i>Old Point Fish Co., Inc. v. Haywood, et al.</i> , 109 F. (2d) 703 (4th Cir.).....	21, 22
<i>Reed v. Hussey</i> , Fed. Cas. No. 11,646 (D.C.N.Y.).....	20
<i>Sigurjonsson v. Trans-American Traders</i> , 188 F. (2d) 760 (5th Cir.).....	20
<i>Vlavianos v. The Cypress</i> , 171 F.(2d) 435 (4th Cir.)	20
<i>Webster v. Beau</i> , 77 Wash. 444, 137 Pac. 1013.....	24
<i>Westfall, et al., v. Tug Boat Company</i> , 73F.(2d) 200 (9th Cir.).....	18
<i>Williams v. The Sylph</i> , Fed. Cas. No. 17,740 (S.D. N.Y.)	20

STATUTES*Page*

28 U.S.C.A. Sec. 1291.....	3
28 U.S.C.A. Sec. 1333.....	3, 19

RULES

Rule 46 $\frac{1}{2}$, Rules of Practice in Admiralty and Maritime Cases	25, 26
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United States Court of Appeals

For the Ninth Circuit

FRED I. PUTNAM and JAMES A. OVERMAN,
Appellants,

vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE
S. HERNING, EDGAR L. PEECHER, WIL-
LIAM E. BARQUIST and NORMAN L.
BUNKER,
Appellees.

No. 14645

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

The appellants were the owners of the oil screw Silver Spray and sold the vessel to Robert J. Tobin for the sum of \$35,000.00 on a down payment of \$5,000.00, taking a first preferred marine mortgage to secure the balance (Libs. Putnam and Overman, Exs. 4 and 5). Under written agreements Tobin sold fishing shares to appellees Harry C. Lower, George S. Herning, Edgar L. Peecher, William E. Barquist and Norman L. Bunker. Before the Silver Spray commenced the fishing voyage it was attached by the United States Marshal on a libel in rem filed by Lower (Tr. 3). The libel purports to be "in a cause of wages and damages, civil and martime" and seeks a recovery of \$5,000.00

against the vessel in rem as the sum Lower might have earned had the fishing venture been fulfilled. The appellees Herning, Peecher, Barquist and Bunker filed intervening libels of the same substance (Tr. 12, 20, 27) and for like recoveries but did not apply for formal seizure through monition and attachment.

Thereafter the appellants intervened by their libel in rem and in personam (Tr. 33) to foreclose their first preferred marine mortgage and proceeded with the formalities of an original monition and attachment (Tr. 41).

The District Court issue was whether the appellees had liens for future fishing shares, or any liens at all, superior to appellants' preferred mortgage.

The said appellees did not cite Tobin for in personam recoveries but only for deficiencies after sale.

The appellants contend that the pleadings of the said appellees, together with uncontradicted evidence and testimony, clearly demonstrate that in fact said appellees brought the proceedings as a means to recover their original investments on the grounds that Tobin extracted monies through fraud and deceit. Accordingly, the actions were not of admiralty cognizance and should have been brought as common law proceedings. Therefore the appellants take the position that the District Court did not have jurisdictional authority to enter Findings of Fact and Conclusions of Law (Tr. 63) and the Decree (Tr. 77) granting said appellees maritime liens for speculative earnings on fish that were never caught, all to the prejudice of appellants' mortgage.

Jurisdiction is only one issue on appeal. As developed in our Statement of the Case and our Argument we challenge the merits on two points, namely: said appellees were not entitled to maritime liens for speculative fishing shares where the vessel never left the dock and consequently fish were never caught; and, there was an utter failure to prove speculative damages.

Jurisdiction of the District Court

It is contended the District Court did not have admiralty jurisdiction to entertain appellee Lower's libel in rem or the libels of Herning, Peecher, Barquist and Bunker as in fact and law they were common law actions to recover money had and received through deceit, and as such jurisdiction was solely vested in the common law side of the appropriate court. Under the provisions of Title 28, U.S.C.A., Sec. 1333, the District Court did have jurisdiction to foreclose appellants' first preferred marine mortgage as alleged in their Intervening Libel in Rem and in Personam (Tr. 33).

Jurisdiction of the Court of Appeals

The jurisdiction of this court is granted by the provisions of Title 28, U.S.C.A., Sec. 1291, which gives to the Courts of Appeal, jurisdiction of all appeals from final decrees of District Courts.

STATEMENT OF THE CASE

Throughout the trial the said appellees stressed their claims that Tobin intended to defraud them in the original negotiation of the written fishing share agreements beginning with the Lower contract of April 17, 1954, through to the Bunker contract of June 2, 1954 (Res. Exs. A-1, and A-5 to A-8 incl.). They further

contend that Tobin abandoned the Silver Spray on June 7, 1954. The District Court found (Findings of Fact XV, Tr. 67; Oral Decision, Tr. 281) that Tobin did so abandon the venture giving rise to liens for future fishing shares.

The appellants will make some reference to the facts to support their basic argument that the said appellees actually claimed fraud and deceit as a basis for the recovery of their investments and therefore the District Court sitting in Admiralty lacked jurisdiction. Insofar as the priority of the mortgage is affected, the appellants are not concerned with Tobin's intentions at the times the contracts were executed, or why or under what circumstances the said appellees left the vessel. The applicable law will demonstrate that in rem liens cannot exist for future speculative fishing shares where the voyage was never undertaken, and particularly where the libelants themselves caused the vessel's seizure. For what the observation may be worth, appellants do feel that the finding of wrongful discharge by Tobin cannot be justified by the record. Had there been a wrongful discharge, said appellees might have had personal recourse against Tobin but not against the Silver Spray to the prejudice of the mortgage. Appellants do believe that the record lends credence to said appellees' position that in the original negotiation of each share contract, Tobin exaggerated the earning potential of the Silver Spray. In properly instituted actions at common law, juries would be required to determine whether said appellees were thoroughly informed and accepted the consequences, or whether they were induced through fraud to part with their funds.

At this time it may be appropriate to explain the position of appellee Kadlec. On April 14, 1954, he signed a working share contract with Tobin on the Sockeye (Res. Ex. A-10) but by an intervening libel (Tr. 12) claimed he was a member of the crew of the Silver Spray. He maintained in his libel, as did the others, that Tobin discharged him and accordingly he was entitled to recover against the Silver Spray the sum of \$5,000.00 as his share of the 1954 tuna catch, if the vessel had gone fishing. Later Kadlec, through his proctor Robert Wells, withdrew from the case (Tr. 31) and refused to plead further. At the trial, however, he appeared through Bogle, Bogle & Gates, and for the first time orally claimed a lien of \$500.00 for wages due while working on the Silver Spray. Thus throughout this brief Kadlec will be referred to individually as distinguished from the remaining appellees who signed Silver Spray fishing contracts and who will be collectively referred to as "libelants" or "appellees."

The validity of appellants' preferred mortgage has no relationship to the representations or the misrepresentations made by Tobin at the varying times the contracts were entered into. However, it would seem that the trial court was persuaded to hear the case in admiralty in order to test the legitimacy of Tobin's defalcations as alleged and testified to by the appellees. Principally the appelles complain:

1. They were induced to buy shares to tuna fish off San Diego, California, and make anywhere from \$5,000.00 to \$7,000.00 a year.
2. In San Diego the vessel would be outfitted with bait tanks and refrigeration.

3. Tobin claimed the vessel was a tuna clipper when it was not.
4. Tobin claimed he had a contract with Van Camp's in California.
5. Tobin said they would hire a helicopter to find tuna.
6. Tobin told Lower and Herning that he owned the boat but did not at that time.

These, among other statements, were strongly emphasized by appellees at the trial as being misrepresentations. Tobin answered that he knew nothing about tuna fishing and said so but hoped the fishing party would accomplish its purpose; had a purchase agreement for the boat from appellants which was not consummated until April 28, 1954, the date of the note and mortgage; was told by a third party that the Silver Spray was a tuna clipper and that tuna clippers made that kind of money; and, further, that the shareholders were fully informed of these factors and understood the risks involved.

To reveal the background leading to these proceedings, and to enlighten the court as to the general nature of the controversy between appellees and Tobin, and to support our jurisdictional argument, we proceed with the highlights of one of the strangest of all maritime adventures.

Pursuant to newspaper ads (Lib. Ex. 3) the appellees communicated with Tobin and after preliminary discussions signed the share contracts as noted. All paid \$2,500.00 except Bunker, who paid \$1,500.00 and gave a promissory note for \$1,000.00 for the balance. Each of the contracts in part provides that if the shareholder becomes dissatisfied he shall give Tobin thirty days

notice to enable Tobin to replace the share without hindering operations, and if the shareholder leaves or is dismissed he shall give Tobin ninety days to make a full refund. Each contract also provided that Tobin had the right to direct the vessel's movements.

On May 18, 1954, the Silver Spray left for Alaska on a shake down cruise and on board were the appellees, Tobin, Kadlec, Doss R. Payne, one James T. Gehrig and three hired members who were the cook, the engineer and the captain Don Moore. Payne was an intervening libelant along with Kadlec and Bunker (Tr. 12) but Payne refused to press the litigation or appear at the trial. One other man named Trowbridge went along for the excursion but his identity plays no part in the litigation. After the Silver Spray reached Alaska, and within several days of May 21, 1954, Tobin returned to Seattle by air to investigate a fruitless Silver Spray enterprise that should have developed during the Alaska trip (Tr. 236, 237). Gehrig and Peecher returned with him, the later claiming he could not stay aboard due to his health. Peecher wanted a quiet settlement and Tobin agreed to refund Peecher's money as fast as possible (Tr. 173, 238).

Appellants leave this meager review of the transcript momentarily to remind the court that as evidenced by the testimony, the appellees' case was founded upon the proposition that the happenings during the Alaskan voyage were part and parcel of Tobin's design to exact funds through false representations.

Reverting to the record we find that when Peecher arrived in Seattle he continued on to his home in Port-

land, Oregon. On May 28, 1954, Tobin wrote Peecher that he was leaving for the south very soon and wanted to know if Peecher was willing to go along or have his money back. Peecher replied on May 29 that he would be under a doctor's care and would like his money as soon as Tobin could pay (Res. Ex. A-9). While in Seattle Tobin claims he checked with various sources as to the means of obtaining equipment to tuna fish (Tr. 240). This episode, as are all others, is doubted by appellees. On May 28, Tobin wired Moore and Lower in Alaska as follows:

"Get ready to leave immediately for Seattle. Bring poles so can outfit for southern tuna. Call me Edmond Meany Hotel, Seattle, immediately."
(Res. Ex. A-2)

On June 2, Tobin and Bunker signed the working share agreement to leave for tuna fishing shortly (Tr. 205-206). By ship-to-shore Tobin learned that the vessel hit a log in Puget Sound and needed repairs. Moore and Lower met Tobin at the hotel at 5:30 A.M., June 3, and Tobin instructed Moore to let the men off to go home during drydocking. Tobin made drydocking arrangements and in the evening told Lower he was going to Spokane because his daughter was sick. Tobin did so and remained there until June 7. According to Tobin he removed his gear from the vessel so that Bunker could have the captain's quarters, but in any event Tobin expected to precede the vessel to the south (Tr. 262). On June 4, Lower removed all his gear (Tr. 108), never returned to the Silver Spray, and on June 5 sought legal guidance through the Seattle law firm of Bogle, Bogle and Gates.

There has been no satisfactory explanation for the occurrences between Tobin's departure on the evening of June 3 until his return to Seattle on June 7. Peecher announced his decision to withdraw by his letter of May 29. Lower left on June 4. Gehrig, who was on board June 4, testified that a number of people were mad at each other. Barquist then wanted to retire and recoup his investment (Tr. 270). Gehrig testified Tobin wanted to go tuna fishing, though Gehrig wanted to freight in Alaska (Tr. 269). On the 4th Gehrig wanted to remove Tobin from the vessel and form a corporation (Tr. 171). The libels allege Tobin abandoned the vessel and appellees did not know his whereabouts, though several tried to reach him at his own Spokane address. Gehrig contacted him and said there was trouble, whereupon Tobin sought a Spokane lawyer. On June 7 Tobin returned to the vessel and found Peecher so pugnacious that he threatened to jail Tobin unless he got his money back (Tr. 242) and wanted to punch him in the nose (Tr. 177). Tobin said settle with my lawyer and arranged to see Mr. Swontoski that evening. While at the lawyer's Barquist wanted nothing more than his money back, and was willing to abide by the contract and give Tobin the agreed ninety days (Tr. 270). Throughout this upheaval Bunker assumed he would take the boat tuna fishing (Tr. 270).

As far as Herning is concerned, he went home for liberty on the 3rd when the vessel docked (Tr. 148). Tobin called him on the 3rd and asked if he could handle the engine room (Tr. 149). Herning knew the vessel had to be drydocked and an operational delay was unavoidable (Tr. 155).

After the fiasco of the 7th, Tobin proceeded to put the vessel in drydock (Tr. 243) but during the course of repairs it was seized through the Lower libel on June 10; nevertheless Tobin paid the drydocking bill of \$356.00 (Tr. 235; Res. Ex. A-2, pocket S). Thereafter he claims he attempted to post bond, release the vessel and proceed with the operations (Tr. 243, 244).

All appellees admit that Tobin never fired them: Herning (Tr. 156); Lower (Tr. 119); Barquist (Tr. 202); Peecher (Tr. 174).

That the appellees were, or were not, in admiralty solely depends upon their interpretation of the facts under oath and the nature of the relief they were seeking. Accordingly we respectfully defer a review of their testimony on this phase until we reach our argument on the lack of admiralty jurisdiction in the District Court.

To prove damages measured by the loss of speculative fishing shares, the appellees produced Hervey Petrich. Obviously he was an unbiased witness and experienced in the tuna clipper industry. In general he frankly admitted he knew nothing about the potential earnings of a jig boat like the Silver Spray. As the proof of damages is in issue on the merits, we ask leave to detail his testimony throughout the course of our argument on that subject.

Also, at the pleasure of this court, later we prefer to examine the evidence as to Kadlec's alleged wage agreement with Tobin on the Silver Spray.

SPECIFICATION OF ERRORS RELIED UPON

1. The court erred in failing to find and decree that the preferred marine mortgage of appellants Putnam and Overman is a first, prior, and superior lien against the vessel Silver Spray, or its proceeds.

2. The court erred in finding and decreeing that libelant Lower and intervening libelants Herning, Peecher, Barquist and Bunker, or either of them, have any lien whatsoever against the vessel, or any cause of action either in personam or rem enforceable in admiralty.

3. The court erred in finding and decreeing that said libelant and said intervening libelants proved any damages, and this error is assigned regardless of whether the libels were or were not properly instituted and prosecuted within the admiralty jurisdiction of the District Court.

4. The court erred in finding that said libelant and said intervening libelants were employees rather than fishermen expecting to operate fishing lay.

5. The court erred in finding that said libelant and said intervening libelants were ready, able and willing to continue to perform their fishing contracts, and that they or either of them were wrongfully discharged.

6. The court erred in finding and decreeing that on June 7, 1954, the said libelant and said intervening libelants had valid causes of action against the vessel for damages to the extent of the claimed value of the share of each of them in and to a speculative tuna fish catch.

7. The court erred in finding that the Silver Spray was constructed and equipped as a tuna clipper for fresh bait fishing and refrigeration.

8. The court erred in finding that said libelant and

said intervening libelants had or have causes of action properly instituted in admiralty rather than common law actions for fraud and deceit or money had and received.

9. The court erred in finding and decreeing that said libelant and said intervening libelants are entitled to recover \$7,500.00 each or any amount whatever.

10. The court erred in failing to make specific findings on damages as required by Admiralty Rule 46½.

11. The court erred in finding and decreeing that said libelant and said intervening libelants are entitled to maritime liens for seamen's wages.

12. The court erred in decreeing that said libelant and said intervening libelants have superior maritime liens for prospective fishing shares on fish that were not caught.

13. The court erred in failing to find and decree that appellants Putnam and Overman are entitled to a decree foreclosing their preferred ship mortgage as the first and only lien against the Silver Spray, and erred in failing to condemn said vessel and to order its sale to apply the proceeds to the payment of appellants' note and preferred marine mortgage.

14. The court erred in failing to find and decree that said libelant and said intervening libelants should be charged with all costs incurred.

15. The court erred in finding and decreeing that intervening libelant John Kadlec was hired by the owner Tobin to stand watches as a seaman on the shake-down cruise to Alaska; and further erred in finding and decreeing that John Kadlec is entitled to any recovery for wages for the reason that such a finding and adjudication is against the preponderance of credible evidence.

ARGUMENT

As declared at the outset of the Statement of the Case we have not attempted or felt obliged to offer a detailed analysis of the facts. It is clear from the testimony that as events developed, appellees Lower, Peecher and Barquist became convinced that Tobin had attempted fraud and deceit as of the time each contract was executed and the funds changed hands. It is uncontradicted that Lower, Peecher and Barquist elected to withdraw from the fishing enterprise on or before June 4, 1954, and their severance was not due to firing by Tobin. The testimony reveals many instances of misunderstanding and a complete lack of knowledge of tuna fishing by all concerned. Bunker concisely expressed the situation. When asked whether he and Tobin were groping on a new and untried venture, he answered, "I believe the trade name is we were both green beans" (Tr. 210). The chaos was not alleviated by Tobin's puffer talk. As a unit the appellees charge that Tobin's every act was engendered through a plan or scheme to defraud. However, these are not admiralty questions, but issues to be decided by a common law court. If admiralty had any jurisdiction at all, the court could do no more than render a personal judgment against Tobin for damages for wrongful discharge, if there was one, and if damages could have been proven.

Accordingly, the appellants in appealing to this court for the preservation of their marine mortgage are impartial to all the factual differences between Tobin and appellees.

We have emphasized the foregoing facts to prove that

Lower resorted to an in rem action in admiralty on June 10, 1954, as a means to recover his \$2,500.00 paid to Tobin on April 17, 1954.

The libel resulted in Tobin's prevention to resell the shares of Lower, Barquist and Peecher under the contracts, and the appellant mortgagees were compelled to stand by helplessly while the Silver Spray was sold by the marshal at a sacrifice sale of \$11,000.00 (Tr. 87) of which sum all parties stipulated that the marshal be reimbursed for costs to the extent of \$713.65.

As the authorities will demonstrate, the ultimate truth or falsity of wrongful discharge only bears upon the personal recourse that appellees, or any of them, may have against Tobin.

Our presentation of the authorities will be made under the following categories:

- A. Jurisdiction.
- B. Appellees' Liens Are Invalid.
- C. Damages were not Proven.
- D. Kadlec had no Wage Agreement.

A. Jurisdiction

The District Court lacked maritime jurisdiction over Common Law Causes of Action asserted by the libelants, Lower, Barquist, Bunker, Herning, and Peecher.

At the very outset this Court is confronted with a vital question of jurisdiction. The appellants, Putnam and Overman, insist that whatever causes of action the other libelants may have had against Tobin, the owner of the "Silver Spray," such causes of action were essentially common law causes of action for fraud and de-

ceit and hence not within the admiralty jurisdiction of the United States District Court. The claim of Lower, the original libelant, may be taken as typical. In his original libel upon which the vessel was seized by the Marshal (Tr. 1-6), Lower pleaded that on or about April 17, 1954, he was employed by Tobin as a member of the crew of the vessel on a proposed tuna fishing venture; that Tobin failed to carry out the venture as agreed and that in consequence he, the libelant, was entitled to recover \$5,000.00 which would have been his proportionate share of the catch if the venture had not been abandoned by Tobin. Tobin, answering the original libel and the intervening libels of Barquist, Bunker, Herning and Peecher, pleaded a written contract under which these libelants engaged in the proposed tuna venture on a fishing lay basis (Tr. 46-52). Lower replied by denying the validity of the contract and specifically alleged that it was obtained in consequence of fraudulent representations made by Tobin with intent to deceive and hence was null and void and of no effect. That was the vital issue in the case. But however the pleadings may have been framed in the first instance, when the evidence has been taken the pleadings had served their purpose and it is the evidence that must control. The pleadings allege fraud and the uncontradicted evidence, if it proves anything, proves that the real complaint of the so-called shareholders against the owner Tobin is fundamentally a claim for fraud or deceit. The original libelant Lower testified that on April 11, 1954 he was in Hermiston, Oregon and saw an ad in the Portland Oregonian. He went to Spokane and there met Tobin, with whom he had conversations relative to a proposed tuna

fishing operation. He decided to buy a share in the operation and paid Tobin \$2500.00 (Tr. 120-121). Tobin said that he was the sole owner of the boat and Lower put up \$2500.00 relying upon that misrepresentation (Tr. 122).

“Q. (By MR. CAREY) : You are trying to get damages because you claim Tobin deceived you, is that right? A .Yes (Tr. 123).

* * *

Q. At the time you negotiated this contract with Tobin on April 17th and you put up \$2500.00, are you now claiming that Tobin told you the truth or cheated you? A. Cheated me.” (Tr. 123-124)

The intervening libelants above named testified in substance to exactly the same fraudulent misrepresentations on which they relied (Herning, Tr. 158; Peecher, Tr. 178; Barquist, Tr. 203; Bunker, Tr. 212). That this evidence establishes a common law action for fraud, if it establishes anything, cannot be gainsaid. The trial judge, in delivering his oral opinion, admitted that fundamentally the claims of these libelants were founded on fraud perpetrated by Tobin. In the course of that oral opinion, the court said :

“It is possible that such libelant and intervening libelants also had on that day a cause of action at common law against respondent Tobin for fraud and deceit or some other action at law, but on that date such libelant and intervening libelants were not required against their choice to sue upon such causes of action at law, and they did not do so.

“The mere fact that on cross-examination one or more of them may have given testimony tending to evidence a cause of action at law does not in this case prevent the libelant and intervening libelants

from disavowing any request or intention of request for any relief in this admiralty court on any such cause of action at law, and each and all of such libelant and intervening libelants have effectually disavowed any such intent through their counsel who have a right to speak for them." (Tr. 279-280)

This erroneous view is the very foundation of the Decree that the court ultimately entered (See Finding of Fact XIX, Tr. 68). The trial judge thus recognized the jurisdictional obstacle but sought to avoid it because the evidence was elicited on cross-examination, but uncertain as to the sufficiency of that ground, the trial court resorted to an even more untenable ground by holding that although the libelants' causes of action were common law actions for fraud, nevertheless they have disavowed "through their counsel who have a right to speak for them."

We believe it is a novel suggestion that undisputed and indisputable evidence can be completely discarded because and only because it has been elicited on cross-examination. What is cross-examination for if not to develop the facts in general and jurisdictional facts in particular? In the next place, we think it is an even more novel proposal to suggest that a common law action for fraud can be converted into a maritime cause of action, creating a maritime lien superior to an admittedly valid preferred ship mortgage, by the simple expedient of a disavowal by counsel. It is unnecessary to cite decisions from other circuits for the question has already been definitely decided in this circuit by several decisions holding that an admiralty court has no juris-

diction unless the real and substantial controversy is *wholly maritime*. A maritime color lurking in the background is not sufficient.

Home Insurance Company v. Merchants Transportation Company, 12 F.(2d) 931 (D.C., Wash.);

Home Insurance Company v. Merchants Transportation Company, 16 F.(2d) 372 (9th Cir.);

Westfull, et al., v. Tug Boat Company, 73 F.(2d) 200 (9th Cir.).

These decisions from this circuit were called to the attention of the trial judge and no decisions to the contrary were cited or can be cited. If, as claimed, Tobin defrauded Lower and the intervening libelants, their actions were common law actions for fraud or deceit or possibly for money had and received. In either event, there is no jurisdiction in admiralty. Certainly there is no jurisdiction to subordinate a preferred ship mortgage, the validity of which is admitted, because the alleged fraud of the mortgagor is in no way shown to be chargeable to the mortgagees.

In thus assuming that these libelants by disavowal of counsel could effectively convert a common law action for fraud into a maritime cause of action, we believe the trial judge became confused as to the applicable statutory provisions relative to maritime jurisdiction. The jurisdiction of the United States District Court in Admiralty is limited to maritime causes of action. The original Judiciary Act of 1789 gave the United States District Courts exclusive jurisdiction over admiralty and maritime causes of action but saving to suitors "the right of a common law remedy where the common law is

competent to give it." The phraseology of that jurisdictional statute has been changed from time to time but in substance it has always remained the same. It now reads:

"The district courts (of the United States) shall have original jurisdiction, exclusive of the courts of the States of:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." (United States Code Annotated, Title 28, Section 1333, page 575)

A party having a maritime cause of action may, at his election, sue in a common law court but the converse is not true. A party having only a common law cause of action cannot sue in admiralty. The admittedly valid preferred ship mortgage must be given priority without regard to the claims of Lower, et al., that they were defrauded by Tobin.

The intervening libel of Kadlec is on a somewhat different footing. He claims wages as a seaman for services performed on the trip from Seattle to Ketchikan and return, but as will be shown in another place, his evidence wholly failed to show that he was engaged as a seaman by Tobin.

B. Appellees' Liens Are Invalid

Fishermen do not have liens against a vessel for fish that were never caught, and particularly for speculative earnings that might accrue after seizure.

Regardless of the cause of severance of a fisherman from his vessel, and whether right or wrong, and regardless of his right to recover personally against the

owner or master, he cannot seize a vessel and impose a maritime lien *in rem* for a share on fish that were never caught, sold or accounted for. Under no circumstances may a fisherman lien a vessel for any earnings that might have been made from and after the date of seizure by a marshal, and this is particularly true where the libelant fisherman himself causes the attachment.

Generally, a vessel may not be libeled for speculative shares, but only against the vessel for shares of the catch that has been made, brought safely to port and ascertained and liquidated. The same principle applies to any type of vessel with a crew working on a profit-sharing basis:

Reed v. Hussey, Fed. Cas. No. 11,646 (D.C. N.Y.);

Williams v. The Sylph, Fed. Cas. No. 17,740 (S.D.N.Y.).

When a vessel does not engage in the voyage, it cannot be libeled for future earnings, and this is particularly true in those instances where the seizure is caused by the crew:

Sigurjonsson v. Trans-American Traders, 188 F.(2d) 760 (5th Cir.);

Vlavianos v. The Cypress, 171 F.(2d) 435 (4th Cir.).

Though a seaman is hired to safeguard the vessel after seizure and during the lay-up period even then he cannot libel the vessel but must pursue the person who hired him:

Bromfield Mfg. Co. v. The Brown, Smith & Jones, et al., 117 F.Supp. 630 (D.C. Mass.).

The leading case on the lien issue and upon which appellants greatly rely, is *Old Point Fish Co., Inc., v. Haywood, et al.*, 109 F.2d 703 (4th Cir.) In anticipation that the Court will study the opinion, we will not extend this brief by relating the complete facts and legal conclusions. However, the following excerpt may be pertinent at this time as it reflects the thinking of all authorities in point:

“In accordance with the general rule that maritime liens do not arise from matters happening subsequent to the legal seizure of the ship, it has uniformly been held (in the absence of an applicable statute or duly authorized continuing services of seamen) that no maritime lien can be allowed for wages to seamen accruing after the libeling of the ship. * * * (Cases cited) * * * In *Benedict on Admiralty*, 5th Ed., 585, the rule is stated that ‘seizure of a vessel under process, resulting in breaking up the voyage, operates as a discharge of the crew who, therefore, have no lien for further wages.’

* * * * *

“In the instant case it is clear that the crew earned nothing from the catch up to the time of the seizure of the ship, and they performed no services thereafter, but apparently recognized the breaking up of the enterprise by the filing of their libel claims. See *The Nissegogue, supra*; *The Charles L. Baylis* (D.C.) 25 Fed. 862. Whether, if the fishing enterprise had not been broken up, they would subsequently have earned compensation for their share of the catch and if so the amount thereof, was wholly speculative, uncertain, and dependent upon future happenings. If they had been employed for a definite period at a definite wage they would not

have been entitled to a prior lien for the wages accruing after the seizure of the ship, even though the amount were certain. A *fortiori* they were not entitled to a prior lien for compensation which might have been earned from a future catch wholly speculative in amount.” (P. 705)

The trial judge announced that the *Haywood* case was contrary to his own inclinations (Tr. 288, 289) and invited counsel to produce conflicting authorities. None were forthcoming, nor can there be. Thus through independent research the trial court located *Carborne v. Ursich*, 209 F.2d 178 (9th Cir.), and by applying it felt that Tobin had committed a maritime tort (Tr. 288). We utterly fail to see any resemblance of that case to the one at bar. There the offending vessel ran into and damaged a net and the fishermen on the other vessel recovered damages equal to the four days required to repair the net. However, their right to damages was not in issue. The entire opinion by the court was directed to whether the fishermen had a cause of action in their own names or whether it had to be brought by the owner of the net.

Neither does this case come within sound decisions which hold that a wrongfully discharged seaman may, at the end of the season, impose a lien against a vessel for his share of the profits on fish that have been caught.

Appellants do not condone Tobin's handling of the Silver Spray fiasco, but neither do we believe that appellees used ordinary sound business prudence in engaging in the venture. Appellees and Tobin knew from the beginning that none of them had ever tuna fished before. Tobin made no attempt to abscond with the

investments and offered to account for every penny at the trial. Our point now is that under our authorities and the share contracts, he could have dismissed all appellees, and had he done so they would not have a lien for future shares. And regardless of whether they were or were not wrongfully discharged, there can be no recoveries against the vessel for future speculative shares from June 10, 1954, when Lower libeled the vessel.

C. Damages Have Not Been Proven

Appellees' proof of damages related to vessels used as tuna clippers. By the admission of their own expert witness, such testimony had no bearing on the probable profits of a jig rigged boat like the Silver Spray.

We have the deepest respect for appellees' witness Hervey Petrich, who admittedly has vast experience with the bait boat clipper industry. On direct-examination Petrich proceeded to describe the large catches of a tuna clipper, though in reviewing his testimony we fail to find an exact figure for the 1954 season. In any event the probable catch for a large bait boat has no relationship to a jig boat like the Silver Spray. This witness testified that there is a difference between a bait boat and a jig boat and the latter is never referred to as a clipper. He explained that a jig boat is actually a small trolling vessel and usually carries about three men (Tr. 190). Upon being handed a photograph of the Silver Spray he at once declared that the vessel was not a bait boat and his testimony had no relationship to jig fishing (Tr. 188-189). Previously he testified that he had never seen the Silver Spray and did not know her capacity or suitability for catching tuna. We believe the trial

judge erred in finding (Tr. 280, Findings of Fact XVII, Tr. 68) that the Silver Spray was a tuna clipper when Petrich said it was not.

Bait tanks and refrigeration installed in the Silver Spray could not have changed the hull construction or her carrying capacity. Tobin's representations as to these factors could not convert the comparatively small catches of a jig troller into the huge tonnage of a clipper. If Tobin's calling the Silver Spray a "clipper" meant anything, it meant that appellees might only use such a representation as a further element of fraud in a common law action.

Petrich frankly admitted that he could offer no figures as to any catch for the Silver Spray. He was not aware that neither Tobin or the appellees had never tuna fished before. It is inconceivable that he would imply under oath that these parties would fare as well, or fare at all, as fishermen with many years' experience. Regardless of whether the Silver Spray is a clipper or a jig or a seiner, these appellees cannot use Petrich's extensive fishing experience as their own, for unlike Petrich they have never tuna fished before.

This truism is established by the decisions of the State of Washington wherein the contracts were executed:

In *Webster v. Beau*, 77 Wash. 444, 137 Pac. 1013, the plaintiff and defendant entered into a partnership venture to establish a new fur trading business in Alaska but the defendant refused to comply with the contract. Among other causes the plaintiff sued for loss of future

profits. With reference to speculative damages, the court observed:

“It did not pertain to any existing business. Any loss of profits would necessarily mean the loss of such anticipated profits as might possibly be earned in the future from a business not yet created, installed or conducted. *There was no going business which had previously earned profits sufficient to form a basis upon which to estimate probable future profits.* * * * It is common knowledge that parties expecting profitable results frequently enter upon business enterprise which terminate in failure.” (P. 449, Emphasis supplied)

“The doctrine is equally well established that a loss of prospective profits will not become a basis of recovery in an action upon the breach of a contract to launch a new venture or business.”

Quoting from a Kansas decision:

“ * * * it must be made to appear that the business was an one—that is, that it had been successfully conducted for a length of time and had such a trade established that the profits thereof are reasonable and ascertainable.”

In accord are:

Locket Cap Company v. Globe Mfg. Co., 158 Wash. 183, 290 Pac. 813;

Carolene Sales Co. v. Canyon Milk Products Co., 122 Wash. 220, 210 Pac. 366;

Catarau v. Sunde & d'Evers Co., 188 Wash. 592, 63 P.2d 365.

In furtherance of our objections to damages, and as to whether they were properly assessed, we do not believe that Rule 46½ of the Rules of Practice in Admir-

alty and Maritime Cases was complied with. This rule requires that specific findings must be made. No one can be sure as to the District Court's method in arriving at a gross recovery for each appellee in the sum of \$7500.00. They only asked for \$5000.00. At best we may only speculate as to the source of the remaining \$2500.00. Our best guess is that the trial court was refunding appellees' investments on the share contracts. He could not have done so on the theory of enforcement of the contracts for it is admitted that appellees, or some of them, refused to perform by giving the required thirty days' notice, thereby permitting Tobin to have ninety days to re-sell shares. Thus the only other foundation for awarding \$2500.00 to each appellee must have been because at the moment the District Court was sitting as a court of common law and chose to refund these amounts on the common law principles of fraud and deceit.

Our suppositions may be completely out of order, but when rule 46½ is not complied with there is nothing left but conjecture and speculation as to the probabilities.

D. Kadlec Had no Wage Agreement

Kadlec's wage agreement is contrary to the preponderance of credible evidence.

Kadlec's wage claim is unworthy of belief. The excerpts appearing below from his testimony should be sufficient to deny him relief. There were at least nine other men on board for the Alaska trip. Of them, Lower had been in the navy during the war. Moore and Gehrig were licensed in the coastal trade. Herning and Tobin

had been on small boats in Alaska. Helwig was a licensed engineer. At the most, a captain and any two of these men would normally handle the lines on a 77-foot vessel. It is preposterous to assume that Tobin would hire Kadlec as a deckhand under such circumstances, particularly on April 14, 1954, when he did not even own the Silver Spray. Kadlec contradicted himself by saying he had been hired on a wage basis when he had previously testified that he could go along with the Silver Spray if he bought into it. His memory is faulty on a number of things but particularly when he claims part of his duties was standing a regular watch. He could not remember which watch. If he stood a regular watch he would know the hours as surely as a Boeing employee would know whether or not he had been on the swing shift for the past month or so. No one knew of his salaried position. Though Tobin had funds on the way up to Alaska and when back in Seattle, Kadlec made no effort to demand the claimed weekly wage. In Seattle he left the boat for all time and never claimed wages due. Nor did he ask Swontoski. He and Swontoski only discussed \$150.00 for what Kadlec claimed was due on the Sockeye. Nor did he tell his first proctor about such an arrangement. It was not until the second day of the trial that he made the claim contrary to the allegations of his original intervening libel.

The appellants contend the evidence overwhelmingly proves that Kadlec and Tobin did not have a seaman's wage agreement for the Silver Spray:

1. As of April 14th, the date of the Sockeye share agreement, Tobin did not own the Silver Spray, but was merely planning to purchase it (Tr. 139, 215).

2. Kadlec understood that he would receive \$100.00 a week providing he bought a share on the Silver Spray (Tr. 134). He did not do so. It is likely Tobin meant and Kadlec understood that such earnings would be shares of the catch.

3. Kadlec had little experience handling vessels (Tr. 133).

4. Kadlec knew the captain and cook were on wages but he made no mention of the alleged wage contract to anyone (Tr. 139).

5. Kadlec's libel was filed July 26, 1954, but he did not tell his attorney, Robert C. Wells, about a wage agreement (Tr. 217).

6. When the vessel had returned, Kadlec claims he talked with Mr. Swontoski and talked about wages on the Silver Spray (Tr. 216).

7. Mr. Swontoski denies this and testified that Kadlec felt Tobin owed him \$150.00 for working on the Sockeye and he would waive his investment of \$500.00 if the \$150.00 were paid; further, no claim was made against the Silver Spray (Tr. 222, 223).

8. On cross-examination Kadlec admitted he never discussed the Alaska trip with Tobin but found out about the Alaska voyage from other men on board. Not having discussed the trip, he could not explain how he had a wage agreement (Tr. 218).

9. Tobin emphatically denies a wage contract (Tr. 225).

Appellants submit that though he had the burden of proof, the preponderance of the evidence is against Kadlec; any doubts should be resolved in favor of the first preferred marine mortgage.

CONCLUSION

A court of admiralty sits in equity. The appellants handed a valuable vessel to Tobin and took back a first preferred mortgage, valid in all respects. They were entirely innocent of all dealings between Tobin, appellees and Kadlec. On the other hand, appellees entered into this venture with knowledge of the risks, and they were in a position to fully acquaint themselves with their rights and remedies during the voyage to Alaska and upon their return to Seattle. Under the law of maritime liens and of speculative damages, as applied to the facts and circumstances, we are at a complete loss to understand how the District Court was able to ignore appellants' bona fides, and enter a decree which resulted in a substantial loss to and devaluation of appellants' security.

For the reasons set forth we ask that the decree of foreclosure of the mortgage be affirmed but otherwise it be set aside for complete lack of jurisdiction in the District Court. Or should not that be the pleasure of this Court, then that the decree be reversed on the merits.

Respectfully submitted,

WILLIAM H. BOTZER

PEYSER, CARTANO, BOTZER & CHAPMAN
Proctors for Appellants.

United States Court of Appeals
For the Ninth Circuit

FRED I. PUTMAN and JAMES A. OVERMAN, *Appellants*,

VS.

HARRY C. LOWER, JOHN KADLEC, GEORGE S. HERNING,
EDGAR L. PEECHER, WILLIAM E. BARQUIST and
NORMAN L. BUNKER, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEES

M. BAYARD CRUTCHER,
BOGLE, BOGLE & GATES,
Proctors for Appellees.

603 Central Building,
Seattle 4, Washington.

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INDEX

	<i>Page</i>
Statement of jurisdiction.....	1
Statement of the case.....	3
1. Suits for wrongful discharge.....	3
2. Suit for unpaid wages.....	8
Argument	9
I. Findings of fact supported.....	10
A. Evidence of damages.....	11
B. Sufficient under Admiralty Rule 461½.....	14
C. Kadlec's wage agreement.....	15
II. Law properly applied.....	17
A. Court's jurisdiction was clear.....	17
B. Appellees have maritime liens.....	22
1. Attachment does not defeat lien for wrongful discharge	22
2. Lien arises even though damages are measured by prospective catch.....	25
Conclusion	31

TABLE OF CASES

<i>The American Beauty</i> , W.D. Wash., 295 Fed 513..	18, 26
<i>Archawski v. Hanioti</i> , SDNY, 129 F.Supp. 410.....	21
<i>The Betsy Ross</i> , 9th Cir., 131 F.2d 858.....	26
<i>Carbone v. Ursich</i> , 9th Cir., 209 F.2d 178.....	10, 21, 27
<i>The Columbia</i> , EDNY, 6 Fed. Cas. No. 3,035.....	27
<i>Cutter v. Gillette</i> , 163 Mass. 95, 39 N.E. 1010.....	23
<i>Fee v. Orient Fertilizing Co.</i> , EDNY, 36 Fed. 509....	27
<i>Gayner v. The New Orleans</i> , ND Cal., 54 F.Supp. 25	30
<i>The Grace Darling</i> , D.Me., 10 Fed. Cas. No. 5,651.....	18
<i>The Great Canton</i> , EDNY, 299 Fed. 953.....	25
<i>Griffith v. Gardner</i> , 9th Cir., 196 F.2d 698.....	9, 14
<i>The Heroe</i> , D.Dela., 21 Fed. 525.....	9, 24
<i>Home Insurance Co. v. Merchants Transp. Co.</i> , 9th Cir., 16 F.2d 372.....	19, 20
<i>Hoyt v. Wildfire</i> , N.Y., 3 Johns 518.....	21, 30
<i>The Hudson</i> , SDNY, 12 Fed. Cas. No. 6,831.....	24
<i>The Lakeport</i> , WDNY, 15 F.2d 575.....	24

	<i>Page</i>
<i>The Mary Steele</i> , D. Mass., 16 Fed. Cas. No. 3,035....	26
<i>Mason v. Evanisevich</i> , 9th Cir., 131 F.2d 858.....	26
<i>Old Point Fish Co., Inc. v. Haywood</i> , 4th Cir., 109 F.2d 703	10, 24, 25, 28, 29
<i>The Page</i> , D. Cal., 18 Fed. Cas. No. 10,660.....	18, 27
<i>Petterson Lighterage & T. Corp. v. New York Cen- tral R. Co.</i> , 2d Cir., 126 F.2d 992.....	15
<i>Reed v. Hussey</i> , D.C.N.Y., 20 Fed. Cas. No. 11,646....	30
<i>The Risoluto</i> (1883) 5 Asp. Mar. Cas. 93.....	27
<i>Sigurjonsson v. Trans-American Traders</i> , 5th Cir., 188 F.2d 760	22
<i>Strom v. The Montague</i> , W.D. Wash., 53 F.Supp. 548	18
<i>United States v. Laflin</i> , 9th Cir., 24 F.2d 683.....	10, 28
<i>Van Camp Sea Food Co. v. Di Leva</i> , 9th Cir., 171 F.2d 454.....	10, 26
<i>Vlavianos v. The Cypress</i> , 4th Cir., 171 F.2d 435.....	9, 22, 23, 25
<i>The Wanderer</i> , C.C., D.La., 20 Fed. 655.....	24
<i>Webster v. Beau</i> , 77 Wash. 444, 137 Pac. 1013.....	29
<i>Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.</i> , 9th Cir., 73 F.2d 200.....	19
<i>Williams v. The Sylph</i> , SDNY, 29 Fed. Cas. No. 17,740	22, 29

TEXTS

1 Benedict on Admiralty (6th Ed., 1940), § 61.....	20
5 Williston on Contracts (Rev. Ed. 1937), § 1358	30
§ 1362	24

STATUTES

46 U.S. C., § 594.....	25, 29
------------------------	--------

RULES

General Admiralty Rule 46½, 28 U.S.C.A.....	14, 15
Ninth Circuit Civil Rule 18.2 (d).....	10

United States Court of Appeals For the Ninth Circuit

FRED I. PUTNAM and JAMES A. OVERMAN,
Appellants,

vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE
S. HERNING, EDGAR L. PEECHER, WIL-
LIAM E. BARQUIST and NORMAN L.
BUNKER,
Appellees.

No. 14645

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEES

STATEMENT OF JURISDICTION

**These suits were brought by crewmembers against vessel
and owner for wrongful discharge and for wages due
—they were properly brought in admiralty**

The original libel and four intervening libels in this case were filed in the United States District Court for the Western District of Washington, Northern Division, by former members of the crew of the fishing vessel SILVER SPRAY. These men—the appellees here—alleged that they had been hired by the SILVER SPRAY's owner to fish on shares for the 1954 tuna season, and that the owner had wrongfully discharged them (Libels: Lower, Tr. 4, 5, pars. III, V, VII; Herning, Tr. 28, 29, pars. III, V, VII; Peecher, Tr. 24, 25, pars. III,

V, VII; Barquist, Tr. 21, 22, pars. III, V, VII; Bunker, Tr. 17, 18, pars. III, V).

One crewmember, Kadlec, was permitted to amend his claim to conform to the proof (Tr. 214), and showed that he had earned agreed wages of \$100.00 a week while working aboard the SILVER SPRAY, which were unpaid. He did not claim any wrongful discharge.

The respondent vessel SILVER SPRAY was regularly seized pursuant to the prayer of Lower's libel (Tr. 7, 8). The respondent owner, Robert J. Tobin, appeared in the actions to claim and defend the vessel (Tr. 46 *et seq.*).

The appellants, who held a preferred ship mortgage on the vessel, intervened for their interest (Tr. 33 *et seq.*).

The trial court found, in answer to the same arguments now being advanced upon appeal, that these libelant crewmembers had valid causes of action for damages, both against the SILVER SPRAY and against her owner (Findings XVII, XVIII, Tr. 68), and that they had maritime liens for their respective damages, of the same nature and rank as for seamen's wages (Findings XX, XXI, Tr. 69).

The district court properly concluded that this proceeding was within its admiralty and maritime jurisdiction (Conclusion I, Tr. 73), and entered a decree awarding damages to each of the libelant crewmembers against both the SILVER SPRAY and its owner (Tr. 78, 79). The court likewise decreed foreclosure of appellants' mortgage, with costs (Tr. 79, 80), but subordinated their lien (Tr. 81).

The vessel was subsequently sold by the Marshal, for a sum much less than the judgments against her (Tr. 87). The proceeds remain in the registry of the court, the decree for the crewmembers having been superseded by the appellant mortgagees (Tr. 88).

STATEMENT OF THE CASE

Since the statement by appellants is not correlated to the pleadings or the findings, and does not fairly summarize the status of this case on appeal, we are obliged to provide a statement of our own.

1. The Suits for Wrongful Discharge

As previously noted, the appellees Lower, Herning, Peecher, Barquist and Bunker were hired on shares by the owner of the vessel *SILVER SPRAY* to fish for tuna during the 1954 season, off the coast of Southern California (Findings III, V, VII, IX, XI, Tr. 64, 65, 66).

They went to work aboard this vessel, each at a different time (Findings IV, VI, VIII, X, XII, Tr. 64, 65, 66).

Thereafter the respondent owner and operator, Tobin, abandoned the vessel and the fishing enterprise, effecting a wrongful discharge of these men (Finding XV, Tr. 67). This abandonment was through no fault of the crewmembers (Finding XVI, Tr. 68).

The case is unusual in several respects.

First, the vessel owner did not seek fishermen in the customary way. He solicited them through newspaper advertisements (Tr. 96, 133, 144, 161, 192, 225).

A typical want ad is in evidence as Exhibit 3:

“Commercial Fishing

“Tuna boat leaving for southern waters, \$2,-500.00 required. No investment risk. Must be dependable. Write 17-40 Times.”

As this ad implies, each of the appellees was required to advance funds to the vessel owner as a condition of employment (Exs. A-1, A-5, A-6, A-7, A-8; Tr. 259, 260). Mr. Tobin explained at the trial that the purpose of this money was to outfit, provision and operate the SILVER SPRAY (Tr. 251). Such advances did not give the crewmembers any right or interest in the vessel itself (Tr. 247), or even any voice in its management (“working share agreement,” Tr. 50, clauses 2, 3, 4).

A second unusual fact is that the vessel owner did not “fire” any of the libelants—he first ignored the agreements he had made with them, and then actually abandoned them.

Instead of taking the SILVER SPRAY south to fish, he took it north to Alaska, for a “shakedown” and supposedly to pick up a load of shrimp at Wrangell (Tr. 99, 236). This was not a voluntary departure, so far as most of the sharesmen were concerned.¹ Tobin debarked before they reached Wrangell (Tr. 112), and when no load of shrimp materialized (Tr. 194, 195) he instructed the master to look for cargo to haul *in Alaska* and then flew south (Tr. 102). The crew heard from the

¹HERNING was not asked whether he would agree to go to Alaska (Tr. 147). PEECHER objected to Tobin that wasn’t what he came aboard for; “I come aboard the ship to go to San Diego on a tuna fishing trip” (Tr. 166). BARQUIST was not asked; “I didn’t have any say about it” (Tr. 194). LOWER consented to go north, with the understanding the vessel would return and go tuna fishing (Tr. 111). BUNKER had not yet been hired.

master that Tobin had “ditched” them (Tr. 140). This was what they believed (Tr. 176).

While Tobin pretended to pick up the tuna venture later (Ex. A-2), actually he did nothing (Tr. 254, 255). When the SILVER SPRAY arrived back in Seattle on June 3, 1954, he covertly removed his personal effects (Tr. 136, 169, 196) and retreated to Spokane. Tobin’s business agent suggested that the crewmembers “incorporate” (Tr. 106). Tobin could not be reached (Tr. 107, 128). Even his agent had a difficult time in getting him back to Seattle for a final meeting with members of the crew (Tr. 273).

When Tobin finally did come back on June 7, three weeks after the scheduled departure for San Diego (Tr. 97), Barquist asked him, “What are we going to do now?” Tobin only answered, “Go up to my attorney and get your money” (Tr. 197).²

Lower filed the first libel, three days later (Tr. 7), and the other crewmembers followed suit.

The other unusual aspect of this case, is, of course, that the fish catch which was to compensate the crewmembers under their agreements with the vessel owner was entirely prospective.

(a) The issue of jurisdiction

In his Answer, the vessel owner set up certain terms of the contracts originally signed by each of these crewmembers (Exs. A-1, A-5, A-6, A-7, A-8) as an affirmative defense to their claims (Tr. 47, 49, 50, 51).

²Tobin’s own witness confirmed this (Tr. 273). All that BARQUIST got from the lawyer was a legal opinion (Tr. 198).

Crewmember Lower replied, alleging that Tobin had made certain material representations to induce him to sign the contract (Tr. 52, par. II). The reply continued:

“The aforesaid representations by respondent were false, and were made by him with intent to deceive libelant so that the said writing prepared by respondent and then executed by libelant as aforesaid, and as alleged by respondent in answer to the libel, is null and void, and of no effect.” (Tr. 53, par. III)

Similar replies were made by the intervening libelants Bunker (Tr. 55, 56, pars. II, III), Peecher (Tr. 59, 60, pars. II, III) and Barquist (Tr. 61, 62, pars. II, III).³

It will be readily apparent, from the foregoing, that the issue of deceit was raised to dispute the respondent vessel owner's contention that the alleged contracts represented the true agreement with each of these crewmembers.

Appliants contend, in sweeping generalities, that because this incidental issue of deceit was raised, and because on cross-examination some of the crewmembers admitted they thought Tobin had cheated them, and that they wanted back the money they had given him, the whole character of the crew's claims was changed into a common law action for fraud and deceit (Brief, pages 14 *et seq.*).

The trial court concluded that the crewmembers were entitled to their remedy in admiralty (Oral opinion, Tr. 279, 280), and so found (Findings XVII, XVIII, XIX, Tr. 68).

³Crewmember HERNING is not concerned with this question, since he did not make such an allegation in his reply (Tr. 57).

(b) Appellants contend that fishermen on shares, wrongfully discharged, cannot libel their ship before the end of the season, and that in any event they have no maritime lien for their damages

As previously noted, the trial court held that the libelant crewmembers had maritime liens for their respective damages, of the same nature and rank as for seamen's wages (Findings XX, XI, Tr. 69).

Appellants contest this ruling, on two grounds:

(1) The damages related to prospective fishing after the date the SILVER SPRAY was seized (Brief, p. 20 *et seq.*).

(2) The measure of damages is speculative (Brief, page 20).

(c) Appellants contend that the damages for wrongful discharge were not proven

The trial court found that these crewmembers had been employed under certain terms. The SILVER SPRAY was to be equipped as a clipper, with fresh bait tanks and refrigeration. It was to fish for tuna throughout the 1954 tuna season, operating from Southern California. Each man was to receive one-tenth of the season's catch as his share (Findings III, V, VII, IX, XI, Tr. 64, 65, 66).

The court further found that the measure of damages for wrongful discharge was the prospective value of a share in the catch which might reasonably have been expected had Tobin fulfilled his agreements (Oral opinion, Tr. 280), and fixed that value at \$7,500.00 (Finding XX, Tr. 69).

The actual damages awarded took into account individual earnings and prospective earnings from other sources up to the end of the tuna season (Finding XXII, Tr. 69, 70; Stipulation, Tr. 292, 293).

Appellants attack Finding XX (the value of each prospective share), implying at page 26, of their brief that there was no substantial evidence upon which to base the figure of \$7,500.00, and asserting that the Finding does not suffice under Admiralty Rule 46 $\frac{1}{2}$, 28 U.S.C.A.

2. The Suit for Unpaid Wages

One crewmember, Kadlec, was not hired for the entire tuna season, nor would he have been entitled to a share of the catch. As has been previously noted, he was hired for wages, and maintained his action at the trial of this case to recover the unpaid balance. He prevailed (Findings XIII, XIV, Tr. 67).

Appellants make an argument that these findings are contrary to "the preponderance of the evidence" (Brief, pages 26 *et seq.*).

ARGUMENT

1. The findings of fact are supported by substantial evidence. Particularly,

(a) there is convincing evidence of the prospective fishing shares which would have been earned had the vessel owner fulfilled his agreements, based upon minimum average catches of similar tuna boats in prior years; and

(b) the finding thereon was sufficient in form, under a late decision of this court, *Griffith v. Gardner*, 196 F.2d 698;

(c) the wage agreement with appellee Kadlec was clearly proven—Tobin's testimony on this point was preposterous.

2. The trial court properly applied the law.

(a) The fact that the vessel owner has deceived or cheated his crew does not exclude them from their admiralty remedy for wrongful discharge. Admiralty's traditional solicitude for seamen makes this conclusion obvious. Appellants cite no case even suggesting their contrary view.

(b) Appellees have a maritime lien for their damages.

(1) That fact that the vessel is attached before the end of the fishing season is immaterial, since the wrongful discharges were effected before, and not as a result of, the attachment. A seaman has a lien for his damages for wrongful discharge, which he can enforce immediately. *Vlavianos v. The Cypress*, 4th Cir., 171 F.2d 435. The fact that damages relate to prospective earnings after attachment is immaterial. *The Heroe*, D.Dela., 21 Fed. 525.

(2) The trial court followed prior decisions of this

court, and other respected admiralty precedents, in estimating damages by reference to prospective catches. *Carbone v. Ursich*, 209 F.2d 178; *Van Camp Sea Food Co. v. DiLeva*, 171 F.2d 454, and *United States v. Laflin*, 24 F.2d 683, all allowed such damages. Dictum to the contrary in the majority opinion of *Old Point Fish Co. v. Haywood*, 4th Cir., 109 F.2d 703, is neither authoritative nor persuasive.

I. The Findings of Fact Are Supported by Substantial Evidence

We note at the outset that appellants have failed to comply with Rule 18. 2. (d) of this Court, requiring that where findings are attacked the appellants state particularly in the specification of errors wherein the findings are alleged to be erroneous.

Not one of the specifications refers particularly to the alleged error in any given finding of fact by the trial court (except perhaps Findings XIII and XX), nor is any specification mentioned in appellants' argument.

Under these circumstances appellees should not be required to assume the burden of justifying each finding by reference to the many items of evidence which go to make it up, merely because the appellants pick at it indirectly with generalities and fragments of testimony.

All of the witnesses testified in open court. The testimony of the libelant crewmembers abundantly supported the findings by the trial court (a) that they were individually hired to work aboard the SILVER SPRAY on shares, upon the terms stated in the Findings, (b) that they went to work on the vessel and (c) that the owner soon afterwards left the SILVER SPRAY, in Alaska, and

by his actions thereafter showed that he did not intend to return or to put the vessel to tuna fishing.⁴

We do not understand that the appellants themselves seriously question these basic findings. They say that they are impartial to the differences between owner and crewmembers, and that this can only affect the remedy of the crew against Tobin personally (Brief, pages 13, 14).

A. There is substantial evidence to support the finding of damages for wrongful discharge

The first finding of fact specifically pointed out and challenged by appellants is Finding XX, at pages 23 *et seq.* of their brief.

The relevant part of this Finding reads as follows:

“That the value of each of said shares referred to in finding number XV was and is the sum of \$7,500.00, * * *.”

Appellants complain (specification 3, Tr. 84) that the crewmembers failed to prove *any* damages.

Following is a summary of evidence as to the prospective tuna catch of the SILVER SPRAY, had her owner carried out his agreements with the crew.

(a) *Capacity*—The SILVER SPRAY had a hold capacity of approximately 70 cubic tons (Tr. 205).

(b) *Equipment*—This vessel was represented to the crewmembers as a clipper (Exs. A-1, A-5, A-6, A-7,

⁴This general statement is not accurate as to libelant BUNKER. He was not hired until June 2, 1954, and he went aboard the vessel only on June 3, the day that the SILVER SPRAY arrived back in Seattle (Findings XI, XII, Tr. 66). However, his situation is essentially the same.

A-8), which means that she was to be fitted with tanks to carry live bait, and, normally, refrigeration (Tr. 181). The owner represented to the crew members, when he hired them, that the SILVER SPRAY was to be so fitted (Lower, Tr. 97; Herning, Tr. 145; Peecher, Tr. 162; Barquist, Tr. 192; Bunker, Tr. 206). This proper equipping of the vessel was indeed an integral part of the hiring agreements (Findings III, V, VII, IX, XI, Tr. 64, 65, 66).

(c) *Experience*—The vessel owner represented that he had had several years of commercial fishing experience (Tr. 210). He told the libelants that two experienced tuna fishermen would be aboard (Tr. 147, 162, 163, 193, 194).

The libelants themselves had had no tuna fishing experience, but they were well equipped to handle the ship. Herning had been a commercial fisherman (Tr. 143). He also had experience with diesel engines, and served as engineer (Tr. 143, 146). Bunker was a licensed master (Tr. 204). Lower and Barquist had both had sea experience in the Navy (Tr. 96, 191). Peecher was quite familiar with vessels (Tr. 161). Kadlec had served briefly in the merchant marine (Tr. 133).

The one voyage that these men made as a crew was well handled, as the owner himself stated (Ex. A-9).

(d) *Market*—As to every libelant crewmember, the vessel owner, Tobin, represented that he had a contract with Van Camp Sea Food Company's cannery in San Diego, for tuna fishing (Tr. 97, 145, 162, 192, 206).

(e) *Size and nature of prospective catch*—An expert

witness, Hervey Petrich, testified for the libelant crew-members. The following points were established.

Tuna clippers the size of the SILVER SPRAY are being operated in this industry (Tr. 182). The average catch for vessels of this size varies from 250 tons to 300 tons per season (Tr. 184). The catch consists of both yellow fin and skip jack, in the proportion of about 40-60 (Tr. 184, 186).

The run of tuna off the coast of Southern California in 1954—up to the time of trial in the middle of September—had been exceptionally good (Tr. 185).

(f) *Price of prospective catch*—The witness Petrich established that the 1952-1953 average market price for yellow fin and skip jack combined was about \$300 per ton (Tr. 184, 185, 186). The 1955 average market price up to July 27 of 1954 was up, “higher than it has practically ever been in the industry” (Tr. 185, 186). Since that date, it had remained at the level of previous years’ averages (Tr. 186).

(g) *Computation of shares*—The trial court did not announce how it computed the damages, but the following computation is clearly within the evidence:

250 tons (minimum average season catch for vessels of this size) x \$300 (1952-1953 average price for yellow fin and skip jack) equals \$75,000, of which, under his agreements, the owner was to pay the sharesmen one-tenth each (Findings III, V, VII, IX, XI, Tr. 64, 65, 66), or \$7,500.

This figure conforms to estimates which the vessel owner himself made to one of the crew members—“anywhere from \$7,500 to \$12,000 a year” (Tr. 199).

(h) *Conclusion*—There is probative and substantial evidence in the record to support the trial court's figure of \$7,500 as the reasonable value of a one-tenth share of the SILVER SPRAY's catch had her owner carried out his actual agreements with the libelant crewmembers.

Moreover, appellants are scarcely in a position to object to the findings on prospective fishing. Although they were former owners of the vessel they neither took the witness stand nor offered any evidence whatsoever to aid the court on this difficult question.

B. The finding of damages is sufficient under General Admiralty Rule 46½

Appellants assert that Finding XX (Tr. 69) does not comply with Rule 46½ of the Supreme Court Rules of Practice in Admiralty, 28 USCA (Specification 10, Tr. 85; Brief, pages 25, 26).

This Rule provides:

“In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; * * *.”

The apparent objection is that the trial court did not explain the factors which entered into its estimate of the prospective catch. But no such explanation is required of a district court in its findings.

In *Griffith v. Gardner*, 9th Cir., 1952, 196 F.2d 698 (wrongful death and personal injury suit against excursion-boat owner), the district court's findings were challenged as being only an expression of its ultimate

conclusions from the evidence. Appellants claimed that the court was avoiding the requirements of Admiralty Rule 46 $\frac{1}{2}$.

In rejecting appellants' argument, this Court made a clear statement of the function of a finding of fact.

“ * * * The phrase ‘finding of fact’ may, and in this case we think does, reflect the ultimate judgment of the court on a mass of details involving not merely trustworthiness of witnesses but other appropriate inferences that were drawn from living testimony which elude proof in a cold appellate record. A finding of fact depends on the nature of the materials on which the finding is based and the expression itself may be a summary characterization of complicated factors of varying significance for judgment. Thus, a conclusion by way of reasonable inference from the evidence, is a ‘finding of fact.’ ”
196 F.2d 701.

This ruling follows the decision from the Second Circuit, *Petterson Lighterage & T. Corp. v. New York Central R. Co.*, 2d Cir., 1942, 126 F.2d 992 (collision):

“Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law.” 126 F.2d 996.

C. There is substantial evidence to prove Kadlec's wage agreement

The other Finding of Fact specifically pointed out and challenged by appellants is Finding XIII, their Brief, pages 26 *et seq.*

This finding is as follows:

“That on or about April 28, 1954, the intervening libellant John Kadlec commenced working on board the said vessel at the Port of Seattle as a member of its crew, for an agreed wage of \$100 per week. That the said intervening libellant thereafter continued to serve on board said vessel as a member of its crew until on or about June 3, 1954.” (Tr. 67)

Appellants complain that the proof of this agreement is against the preponderance of the credible evidence (Specification 15, Tr. 86).

In fact, the wage agreement to which Kadlec testified was the only sensible explanation for what happened.

Kadlec paid Tobin \$500 for a “working share” in the fishing vessel SOCKEYE, *i.e.*, a one-third share of the catch (Tr. 225; Ex. A-10).

Kadlec testified to his meeting with Tobin, and continued:

“Then Mr. Tobin showed me a picture of the SILVER SPRAY. He said: ‘I am planning on purchasing this boat.’ And he was telling me all about what a good boat—and he said: ‘If I decide to put you on this boat, that is where you will be,’ he said, ‘because you only have \$500.00 in this, and I want to put you wherever you are needed.’ * * * (Tr. 138, 139)

Q. (Cross-examination by Mr. Collins) Well, excuse me. On the morning of the 14th you gave him \$500.00, and you signed a contract on the SOCKEYE, and that was the entire conversation at that time?

A. Mr. Tobin also told me that if he decided to put me on this SILVER SPRAY, which he showed me a picture of, that I would work for \$100.00 a week. * * * ” (Tr. 139)

Two weeks later Kadlec went to work for Tobin on the SILVER SPRAY, approximately April 28, 1954 (Tr. 134). He was assistant engineer on the voyage to Ketchikan, standing a regular watch (Tr. 134). He served a regular watch as helmsman during the remainder of his service, until June 3, 1954, when the vessel arrived back in Seattle (Tr. 135, 104).

He was not formally discharged; he simply could not find Tobin (Tr. 136). The only pay he had received was an advance of \$5.00 (Tr. 135).

At the trial the vessel owner took the remarkable position that Kadlec had no wage claim (Tr. 225, 251)—that Kadlec was simply volunteering his services (Tr. 251)!

The only explanation proffered by Tobin for this phenomenon was that Kadlec had a wonderful attitude (Tr. 225).

It is small wonder that the trial court believed Kadlec rather than Tobin (Oral opinion, Tr. 278).

II. The Trial Court Properly Applied the Law

A. An incidental issue of deceit did not defeat the court's admiralty jurisdiction

The affirmative allegations of deceit by the libelant crewmembers⁵ were made only to avoid the respondent Tobin's alleged defenses under the terms of his "working share and contract." See pages 5, 6, *supra*.

This move by the libelants was made to avoid the rule

⁵The following argument does not apply to HERNING, who did not make such an allegation, nor to KADLEC, who relied simply upon an oral wage agreement with the vessel owner.

against parol evidence, which might otherwise have prevented them from testifying as to the true terms of their respective engagements.

For example, Clause 4 of the "working share and contract" (Tr. 50) might have excluded proof of the alleged understanding between Tobin and Lower, that the SILVER SPRAY was to leave on about May 15, 1954, for the season's tuna fishing off the coast of Southern California (Libel, par. III, Tr. 4).

Upon the trial, however, neither Tobin nor the appellants offered any objection to the testimony given by the crewmembers.

The question of deceit, therefore, as a legal issue, became irrelevant. Only the appellants sought to continue it as an issue, on cross-examination of the libelants (*e.g.*, Tr. 122, 123, 124, 158, 178, 203, 212).

The trial court commented upon appellants' efforts to change the nature of the suit, in its oral opinion (quoted in appellants' brief, pages 16, 17).

The jurisdiction of the district court to entertain the suit of a seaman for wrongful discharge, as an admiralty matter, is clear. The fact that he may be a fisherman on a share makes no difference, for this purpose.⁶

The American Beauty, W.D. Wash., 1924, 295 Fed. 513, was a suit in admiralty by fishermen on shares, for

⁶The essential equality of seamen on wages and fishermen on shares, in admiralty, has been frequently affirmed. *Strom v. The Montague*, W.D. Wash., 1943, 53 F.Supp. 548, 1944 AMC 122 (suit for share plus maintenance and cure) is illustrative. The right of sharesmen to enforce their claims on an equal footing with crewmembers on wages has been expressly sustained. *The Grace Darling*, D.Me., 1878, 10 Fed. Cas. No. 5,651, p. 895 (suit for unpaid shares and wages).

damages due to their wrongful discharge. No one questioned jurisdiction. Judge Neterer awarded the fishermen the value of their shares to the end of the season, less their net earnings from other work. *The Page*, D. Cal., 18 Fed. Cas. No. 10,660, p. 977, is another such case, in which jurisdiction was not questioned.

Appellants rely on *Home Insurance Company v. Merchants Transportation Company*, 9th Cir., 1926, 16 F.2d 372, and *Westfall Larson & Co. v. Allman Hubble Tug Boat Co.*, 9th Cir., 1934, 73 F.2d 200, neither of which concern seamen.

In *Westfall Larson & Co.*, appellant had had to pay state court judgments for damage inflicted by its vessel on a bridge and power cable. It sought indemnity from the tug owner in an action in admiralty. This court affirmed the decree dismissing for want of jurisdiction, noting that the damage arose from what was at that time a nonmaritime tort. 73 F.2d 205.

In the *Home Insurance Company* case, appellant had paid claims under marine policies. It later sued the insured, in admiralty, to recover its payments. This court characterized the proceedings in the following language:

“[This] is an action growing out of certain alleged inequitable acts of the appellee, and primarily its purpose is to recover money obtained by means of fraud and false representations.” 16 F.2d 374.

Such a cause was held to be outside the admiralty jurisdiction.

Certainly neither of these decisions is helpful to appellants. The *Home Insurance Company* case could be

relevant only if our suit had been tried and decided on the theory that libelants were seeking recovery of the working funds they had advanced to the vessel owner. No such claims were alleged, either in the libels or in the replies. No such claims were asserted by the proctors for the libelants, upon the trial.⁷

Only Mr. Carey, then the proctor for appellants, tried to make this into an action for fraud and deceit (*e.g.*, Tr. 122, 158, 219).

The criterion of admiralty jurisdiction indicated by this Court in the *Home Insurance Company* case is as follows:

“Jurisdiction in admiralty in cases of contract depends upon the nature of the contract, ‘and is limited to contracts, claims, and services purely maritime and touching the rights and duties appertaining to commerce and navigation.’ The *Eclipse*, 135 U.S. 599, 608, 10 S.Ct. 873, 34 L.Ed. 269.” 16 F.2d, at page 373.

That the contracts of crewmembers with the owner of a fishing vessel are maritime in nature is so elemental that detailed citation of authorities would serve no purpose.

Benedict on Admiralty (6th ed., 1940) §61, commencing the discussion of maritime contracts, states generally:

“The mariners of a ship are commonly said to be wards of the admiralty. Their wages, their rights,

⁷Appellants assert in their brief, page 2, that “appellees brought the proceedings as a means to recover their original investments on the grounds that Tobin extracted monies through fraud and deceit.” There is nothing to justify such an assertion.

their wrongs and injuries have always been a special subject of the admiralty jurisdiction." Vol. 1, page 124.

A late opinion of this Court dealing with the rights of fishermen on shares, speaks of "the familiar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection." *Carbone v. Ursich*, 9th Cir., 1953, 209 F.2d 178, 182.

It would be astonishing if an admiralty court should refuse to help seamen simply because the shipowner had defrauded or cheated them.

A recent district court decision, in a case where the shipowner sold passenger tickets knowing that the vessel would never make the trip, is abundant proof that the admiralty court does not refuse an *admiralty remedy* simply because the defaulting party perpetrated a fraud. *Archawski v. Hanioti*, SDNY, 1955, 129 F.Supp. 410.

A very old case, which has been frequently cited in cases dealing with wrongful discharge, *Hoyt v. Wildfire*, NY, 3 Johns. 518, dealt with fraud by the shipowner, resulting in the wrongful discharge of the crew. The seamen had shipped on a voyage from New York to Bombay. The master deviated from his course under pretense of needing fresh water; and while thus sailing, the vessel was captured, and vessel and cargo were condemned.

"The act of the master, in sailing to the Isle of France, with articles contraband of war, under pretense of a want of water, was a fraudulent act, and

from the testimony in the case, there is every reason to conclude that this was the original destination of the ship, known to the owner, though concealed from the seamen. The contract entered into with the seamen was not kept with good faith. A deceit was practiced upon them. The ship and freight were justly lost by a willful violation of neutral duty, and the seamen had the soundest claim upon the owner for an equitable compensation.' ”⁸

While this was not an admiralty court decision, it is obvious from the subsequent opinion of the district court in *Williams v. The Sylph*, SDNY, 1841, 29 Fed. Cas. No. 17,740, pp. 1407, 1408, 1409, that the Federal court would have held the same.

B. The appellees have a maritime lien for their damages

Appellants take the position that fishermen on shares, who have been wrongfully discharged, have no maritime lien for their damages, under either of two conditions (see page 7, *supra*):

(a) if the damages relate to prospective earnings after the date the vessel was attached; or

(b) if the measure of damages is speculative.

1. Judicial attachment does not defeat a seaman's lien for damages from wrongful discharge

For the first proposition, appellants cite *Sigurjons-son v. Trans-American Traders*, 5th Cir., 1951, 188 F.2d 760, and *Vlavianos v. The Cypress*, 4th Cir., 1948, 171

⁸Quotation taken from *Van Buren v. Wilson*, 9 Cowen 158, 18 Am. Dec. 491, 494, 495.

F.2d 435, cert. den., 337 U.S. 924, 69 S.Ct. 1168, 1171, 93 L.Ed. 1732.

But in the first of these cases the court particularly found that there had been no wrongful discharge, and in the second the court did what appellants say it cannot do.

The crew libeled the ship. The Court of Appeals says: “[The statutory penalty for wrongful discharge] should be liberally applied especially when, as in this case, the abandonment of the voyage and the discharge of the crew were occasioned by no fault on their part but by the failure of the owner to make the necessary provision for the voyage. It is true that the ship was taken into custody by reason of the libel filed by the crew, but the libel was filed after the men had been notified by the owner that the ship would not sail. It is obvious that the abandonment of the voyage was not due to the libel but to the owner’s financial difficulties which compelled him to break his contract.” *Vlavianos v. The Cypress*, 171 F.2d 435, 439.

It is, of course, generally true that no maritime lien arises for wages (or equivalent shares) earned after judicial attachment of the vessel. But damages for wrongful discharge spring from the wrong—they are not accrued compensation.

Williston, in a section dealing with employee’s recovery where trial precedes the expiration of contract, quotes the following from a leading Massachusetts case, concluding that it represents the weight of authority in the United States:

“The plaintiff’s cause of action accrued when he was wrongfully discharged. His suit is not for

wages, but for damages for the breach of his contract by the defendant.”⁹ 5 Williston on Contracts (Rev. Ed. 1937) §1362, pp. 3821, 3822.

Admiralty courts have followed the same reasoning in allowing damages for wrongful discharge although the vessel was seized before the seaman's term had expired.

The Lakeport, W.D.N.Y., 1926, 15 F.2d 575;

The Heroe, D. Del., 1884, 21 Fed. 525;

The Wanderer, C.C., D.La., 1880, 20 Fed. 655;

The Hudson, S.D.N.Y., 1846, 12 Fed. Cas. No. 6,831, p. 805.

Judge Parker explicitly states the matter in his dissenting opinion in *Old Point Fish Co., Inc., v. Haywood*, 4 Cir., 1940, 109 F.2d 703, 707, 708:

“There can be no question but that a sharesman under a fishing lay is entitled to the usual maritime lien for seamen's wages upon the ship, as well as upon the catch or cargo. 56 C.J. 1065 and cases cited. The seizure of the vessel resulting in a breaking up of the voyage entitled him to any amount previously earned and to damages due to the discharge. * * * No distinction can properly be drawn, with respect to the right of lien, between claim for wages earned under a contract and claim for damages arising from discharge in violation of its terms. The lien for wages covers the entire term of employment contracted for. 56 C.J. 1053; *The Wanderer*, C.C., 20 F. 655. And certainly the sea-

⁹*Cutter v. Gillette*, 163 Mass. 95, 97, 39 N.E. 1010; numerous supporting decisions are cited, 5 Williston on Contracts (Rev. Ed. 1937), p. 3822, n. 3.

man's rights thereunder may not be defeated without fault on his part. He cannot, of course, be accorded lien for wages accruing subsequent to seizure for the reason that lien may not be created on the vessel after it has passed out of the control of the owners; but this does not mean that he may not have a lien for the damages resulting from the breach of his contract occasioned by the seizure."

There are, of course, other cases where the statutory wage penalty (46 U.S.C., §594), for discharge without fault, comes into play.¹⁰ This equivalent compensation has been allowed as a lien ranking with wages, both where the vessel has been attached by other lien creditors, *e.g.*, *The Great Canton*, EDNY, 1924, 299 Fed. 953, and where the vessel has been attached at the instance of the crewmembers themselves, *e.g.*, *Vlavianos v. The Cypress*, 4th Cir., 1948, 171 F.2d 435.

In the case now before this Court, the appellees were wrongfully discharged no later than June 7, 1954 (Finding XV, Tr. 67), and Lower's libel on June 10 did *not* break up the voyage. The liens had already arisen, not from the attachment, but from the preceding wrongful discharges.

2. Appellees were entitled to damages even though their shares were prospective

Appellant's second argument is that no lien arises because the fishing shares are speculative.

This manifestly confuses the question of lien with the question of provable damages. If the damages are there,

¹⁰This penalty is not available to fishermen on shares. *Old Point Fish Co., Inc., v. Haywood*, 4th Cir., 1940, 109 F.2d 703.

the lien follows as a matter of course. The following cited cases demonstrate this sufficiently.

The important question is whether fishermen on shares, who are wrongfully discharged before there is any catch, have any basis for proving damages.

We respectfully submit that the courts have traditionally resorted to estimates and averages to fix prospective shares as a measure of damages, and that the trial court here followed this pattern properly.

The several situations in which such prospective shares have been established are these:

(a) *Only one or two members leave the crew.*

The catch actually made by the other fishermen on the vessel is accepted as the measure.

Mason v. Evanisevich, 9th Cir., 1942, 131 F.2d 858 (fisherman injured at beginning of season);

The Betsy Ross, 9th Cir., 1944, 145 F.2d 688 (same situation);

The American Beauty, W.D. Wash., 1924, 295 Fed. 513 (fishermen wrongfully discharged during season).

(b) *The season is interrupted temporarily.*

The catch made by a similar vessel during the detention period has been accepted as a fair measure of the prospective catch.

Van Camp Sea Food Co. v. Di Leva, 9th Cir., 1948, 171 F.2d 454 (collision).

In two similar cases the courts resorted to averages.

In *The Mary Steele*, D. Mass., 1874, 16 Fed. Cas. No.

3,035, pp. 1003, 1005, Judge Lowell thought he "ought to take a rather low average" of the vessel's past trips, in estimating the lost catch.

In *The Risoluto* (1883) 5 Asp. Mar. Cas. 93, where there was a long detention, the court approved estimated damages based upon the average catches of other boats on the same fishing grounds. The claimant there made the same protest which appellants make here.

In still another similar case, *The Columbia*, EDNY, 1877, 6 Fed. Cas. No. 3,035, p. 173, Judge Benedict approved without discussion damages based upon evidence of "the probable amount of menhaden" the schooner would have caught during the detention.

Carbone v. Ursich, 9th Cir., 1953, 209 F.2d 178 (collision), had no express sum of damages to consider. The only measure mentioned is "loss of prospective catches of fish during the period." 209 F.2d 179. However, the court does refer to the cases listed above.

(c) *The voyage is abandoned prematurely.*

In *The Page*, D. Cal., 1878, 18 Fed. Cas. No. 10,660, p. 997, a case of wrongful discharge, the master breached his contract with the crew by negligently failing to provide enough salt. The court estimated the catch "to the time when it might have been reasonably and properly brought to a conclusion," based upon what the men had already caught.

Judge Benedict, in a case where master and crew were wrongfully discharged after only a few weeks of service, adopted the same measure of estimate, past catch. *Fee v. Orient Fertilizing Co.*, EDNY, 1888, 36

Fed. 509, aff'd. sub nom. *Fee v. Orient Guano Manf'g. Co.*, CC, 1890, 44 Fed. 430.

(d) *The voyage breaks up before there is any catch.*

In only one case we find, where the voyage was broken up before any shares were earned, has there been occasion to award damages. In that case this court accepted season average as the measure of probable earnings, without question.

United States v. Laflin, 9th Cir., 1928, 24 F.2d 683, concerned a trading and whaling voyage stopped, apparently before the whaling got under way, by seizure of the vessel for alleged unlawful sealing.

The proof of loss was evidence showing the amount of profits which would have been earned had the seizure not occurred, and the probable catch of whales, during the season. The average amounts of bone and oil taken from whales of the species involved, and the average market price of oil and whalebone in that season, were shown; from which sums were deducted the "usual" costs of outfitting and operating, and a sum for depreciation. 24 F.2d 684.

This measure of loss of a prospective whaling season was not questioned by appellant in that case, apparently.

In *Old Point Fish Co., Inc., v. Haywood*, 4th Cir., 1940, 109 F.2d 703, upon which appellants so strongly rely, the majority held that the arrest of the vessel at the instance of a repairman broke up the voyage without effecting a wrongful discharge, and damages were not recoverable. The court intimated that it would not

award damages anyway, since the prospective *profits* of the crewmembers were wholly speculative.¹¹

Judge Parker, of course, disagreed.

We emphasized the word profit because in the instant case, unlike *Old Point Fish Co.*, the crewmembers were to receive a share of the *gross catch* (Findings III, V, VII, IX, XI, Tr. 64, 65, 66). Profit, of course, includes a substantial element of added conjecture not present here.

For this reason, also, we omit discussion of the Washington State decisions listed on pages 24 and 25 of appellants' brief, since they deal with loss of prospective *profits* to a business.¹²

In *Williams v. The Sylph*, SDNY, 1841, 29 Fed. Cas. No. 17,740, p. 1407, upon which appellants also rely, the master committed barratry. Damages were refused the crew because the court would not penalize the ship-owner for a wrong done by the master so obviously outside his agency. Moreover, the court suspected the crew of giving the master a hand in his "malconduct." The important point in this case is that, had the owner been

¹¹The court referred to *Laflin* with approval, apparently not recognizing that its general condemnation of prospective catch as a measure of damages was in conflict with the decision in this Circuit. Unfortunately the issue was confused because the trial court had awarded damages by analogy to 46 USC, §594, and apparently there had been no cross-appeal.

¹²Three of these cases involved experimental products. The other, *Webster v. Beau*, 1914, 77 Wash. 444, 137 Pac. 1013, concerned a proposed future trading venture north of the Arctic circle, "in a remote and sparsely settled country, under dangerous and adverse conditions." 77 Wash. 449, 137 Pac. 1015.

guilty of breaking up the voyage, the court would have awarded damages.¹³

Reed v. Hussey, DCNY, 1836, 20 Fed. Cas. No. 646, the remaining case cited by appellants, is not apropos.

The general principle with which the court is here concerned is well summarized in *Gayner v. The New Orleans*, ND Cal, 1944, 54 F.Supp. 25, 28.

“That the consideration for libelants’ services might be other employment, rather than cash payments, thus resulting in uncertainty in the amount of libelants’ claim, does not, in my opinion, destroy their maritime lien. So long as the compensation may be translated into money or its equivalent, the lien is effective. Mere uncertainty or difficulty in calculation does not destroy the right. Equity will provide the means for ascertainment of amounts. The Bouker No. 2, 2 Cir., 241 F. 831, 834. Admiralty courts ‘act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend, they act as courts of equity.’ Judge Story in *Brown v. Lull*, 4 Fed. Cas. pages 407, 409, No. 2,018.”

The rule in a civil action would be similar. 5 Williston on Contracts (Rev. Ed. 1937), §1358, Employee’s damages for wrongful discharge, pp. 3810, 3811.

The mere fact that there are probabilities to be weighed does not preclude an admiralty court from estimating damages.

The trial court took the only reasonable criterion available

In this case there were no other crewmembers to continue the season; there was no other single vessel to

¹³See reference to *Hoyt v. Wildfire*, at 29 Fed. Cas., p. 1409.

establish an analogous catch; there were no previous catches by the crew to afford a guide. There was a wrongful discharge and a clear demand for equitable compensation.

The terms of hiring were clearly made out. We knew that (had those terms been fulfilled by the vessel owner) a bait boat of given size and tonnage, with some experienced tuna fishermen aboard, would have been fishing the 1954 tuna season off the coast of Southern California, an established fishing ground. The marketing arrangements had been made with a well known fish company. Fish were actually abundant, and the annual average market price actually bettered in 1954.

Under these circumstances the court took an expert's estimate of the *minimum* average catch for vessels of like tonnage, fishing in the same waters, as established during a number of years, as the appropriate measure of damages.

We submit that this is a reasonable measure, consistent with the formula taken by this court in *United States v. Laflin, supra*, and that the trial court's judgment in the matter ought to be accepted.

CONCLUSION

We respectfully submit that the trial court rightly decided this case in favor of the crewmembers of the SILVER SPRAY, and that its decree ought to be affirmed.

M. BAYARD CRUTCHER,
BOGLE, BOGLE & GATES,
Proctors for Appellees.

United States Court of Appeals
For the Ninth Circuit

FRED I. PUTMAN and JAMES A. OVERMAN, *Appellants*,

vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE S. HERNING,
EDGAR L. PEECHER, WILLIAM E. BARQUIST and
NORMAN L. BUNKER, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

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HARRY C. LOWER, JOHN KADLEC, GEORGE S. HERNING,
EDGAR L. PEECHER, WILLIAM E. BARQUIST and
NORMAN L. BUNKER, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

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INDEX

	<i>Page</i>
JURISDICTION	1
DAMAGES	3
APPELLEES' CLAIMS ARE NOT LIENS.....	4
CONCLUSION	7

TABLES OF CASES

<i>The American Beauty</i> (W.D. Wash.) 1924, 295 Fed. 513	6
<i>Archawski v. Hanioti</i> (SDNY, 1955) 129 F.Supp. 410	6
<i>Carbone v. Ursich</i> (9th Cir., 1953) 209 F.2d 178.....	5
<i>The Columbia</i> (EDNY, 1877) 6 Fed. Cas. No. 3,035..	5
<i>Fee v. Orient Fertilizing Co.</i> (EDNY, 1888) 36 Fed. 509	5
<i>Gaynor v. The New Orleans</i> (N.D. Cal., 1944) 54 F. Supp. 25, 28.....	6
<i>The Grace Darling</i> (D. Me., 1878) 10 Fed. Cas. No. 5,651	5
<i>The Great Canton</i> (EDNY, 1924) 299 Fed. 953.....	5
<i>The Heroe</i> (D. Del., 1884) 21 Fed. 525.....	6
<i>The Hudson</i> (SDNY, 1846) 12 Fed. Cas. No. 6,831....	5
<i>The Lakeport</i> (WDNY, 1926) 15 F.2d 575.....	6
<i>The Mary Steele</i> (D. Mass., 1874) 16 Fed. Cas. No. 9,226	5
<i>Mason v. Evanisevich</i> (9th Cir., 1942) 131 F.2d 858..	6
<i>The Montague</i> (W.D. Wash., 1943) 53 F.Supp. 548..	6
<i>Old Point Fish Co., Inc., v. Haywood</i> (4th Cir., 1940) 109 F.2d 703.....	7
<i>The Page</i> (D. Cal., 1878) 18 Fed. Cas. No. 10,660.....	5
<i>United States v. Laflin</i> (9th Cir., 1928) 24 F.2d 683..	5
<i>Van Camp Sea Food Co. v. DiLeva</i> (9th Cir., 1948) 171 F.2d 454.....	5
<i>The Wanderer</i> (C.C., D. La., 1880) 20 Fed. 655.....	6

United States Court of Appeals

For the Ninth Circuit

FRED I. PUTNAM and JAMES A. OVERMAN,
Appellants,

vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE
S. HERNING, EDGAR L. PEECHER, WIL-
LIAM E. BARQUIST and NORMAN L.
BUNKER,
Appellees.

No. 14645

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

Appellants have no further comments to make with respect to Kadlec; therefore our remarks are directed to the remaining appellees.

Each authority in appellees' brief has been examined with utmost care as related to the transcript, the exhibits, and the arguments and authorities in the opening brief of appellants.

JURISDICTION

Each of the appellees testified that he thought he had been defrauded. The appellants had no reason to initiate this issue for it was agreed that the mortgage was valid. The issue of deceit arose from the appellees' replies (Tr. 52, 54, 57, 59) wherein they claimed the share

contracts had been exacted through Tobin's misrepresentations. The Silver Spray was impounded *in rem* in admiralty without prepayment of costs on Lower's assertion that the suit was for wages. At the trial he and the other appellees testified no wages were due; they had so declared in their replies. Thus at the outset we find the *in rem* jurisdiction tampered with without just cause.

The final and conclusive lack of jurisdiction is shown by the testimony of all appellees that they were defrauded and sued to get their money back.

The only answer of appellees (Appellees' Brief, 20 and footnote) is the assertion that their *proctors* did not claim the suits were in fact for fraud and deceit. In effect they argue that appellees' own conception of the nature of the litigation must be ignored. Counsel declares he can find nothing in the record, though we have referred to and analyzed the testimony (Tr. 122, 123, 158, 178, 203, 212). In addition to the foregoing references Lower testified (Tr. 120):

"Q. You wanted your \$2500.00 back? Correct?

A. Yes.

Q. And isn't that the reason you saw counsel about bringing this suit? A. Yes.

MR. COLLINS: That is all."

Appellees refused to perform the share contracts and disavowed them on the grounds of fraud and false representations. Upon disavowal the remedy was against Tobin for fraud at common law. These remedies are still available.

DAMAGES

Mr. Hervey Petrich testified that he had no knowledge of the earning capacity of a jig or troller like the Silver Spray and his testimony only referred to large tuna clippers. On being handed a photograph by the trial judge he immediately exclaimed (Tr. 188):

“Witness: This vessel is no bait boat. This is a jig boat or trolling boat. Well, we are or have been talking about bait boats.

Q. (By MR. CAREY): What you have been testifying about throughout were the regular tuna schooners built for the tuna service and you haven’t been talking about jig fishing at all?

A. No.”

Mr. Petrich repeats (Tr. 189) that all his evidence related to the capacity of a bait boat and had no relation to a jig boat as shown in the photograph.

Appellees introduced no evidence on a prospective catch of a small capacity three-man troller. Argumentation cannot be substituted for evidence. Nevertheless on page eleven of brief of appellees we find this statement: “Following is a summary of evidence as to the prospective tuna catch of the Silver Spray, had her owner carried out his agreement with the crew.”

This phase of appellees’ argument is built upon one speculation after another: if the District Court had admiralty jurisdiction; if the Silver Spray had an established tonnage; if counsel’s computations were correct, there being none by the District Court; if the vessel were built like a large tuna clipper; if Tobin had a contract with Van Camp; if Tobin, rather than Lower,

Peecher and Barquist had terminated the voyage before it began; if there had been no attachment; if appellees had substantial past tuna experience to match that of Mr. Petrich; and if speculative damages could be reasonably ascertained, then and only upon *proof of all* such eventualities, the appellees might have claims for damages for loss of the catch. But even so. their claims cannot be lienable *in rem*, but only as claims *in personam*.

APPELLEES' CLAIMS ARE NOT LIENS

Quare: *Is there a lien against a vessel for fish that have not been caught, particularly after formal seizure?*

The fishing industry is vitally concerned with the answer to this question.

On page twenty-two of brief of appellees, we note this heading: "Judicial attachment does not defeat a seaman's lien for damages from wrongful discharge." They cite no authority to sustain such a lien for speculative shares after seizure. The appellees go to great lengths to analyze the various methods of computing damages. We can only reply to the authorities offered and realize the majority of cases they cite are to support their several theories on damages and none are quoted to sustain the proposition that fishermen have liens against a vessel for speculative shares where the season had not commenced, and particularly for shares that might have been earned after seizure.

Appellees' decisions fall into five categories:

1. Seamen have a lien for wages or shares that *had been earned* but not paid:

The Hudson (SDNY) 1846, 12 Fed. Cas. No. 6,831;

The Grace Darling (D. Me.) 1878, 10 Fed. Cas. No. 5,651;

The Great Canton (EDNY) 1924, 299 Fed. 953.

2. Upon wrongful discharge, the crew may recover *in personam*:

Fee v. Orient Fertilizing Co. (EDNY) 1888, 36 Fed. 509;

The Page (D. Cal.) 1878, 18 Fed. Cas. No. 10,660.

In the second case, the court observes that inefficient and inexperienced fishermen are not permitted to base any kind of a claim on a full cargo of fish.

United States v. Laflin (9th Cir., 1928) 24 F.2d 683, involves nothing more than a suit against the government for damages for breaking up a whaling voyage.

3. Where the seine is damaged in collision cases involving maritime *torts*, the crew may have a lien against the offending vessel during the time necessary to repair or replace the seine:

The Columbia (EDNY) 1877, 6 Fed. Cas. No. 3,035;

The Mary Steele (D. Mass.) 1874, 16 Fed. Cas. No. 9,226;

Carbone v. Ursich (9th Cir. 1953) 209 F.2d 178;

Van Camp Sea Food Co. v. DiLeva, 9th Cir., 1948, 171 F.2d 454.

It is interesting to observe that in these cases the *tort* liability was not denied, though the measure of

damages was questioned. The real issue in these cases is whether it is for the crew or the owner to institute the proceedings.

4. Specific wage contracts are being enforced:

The Lakeport (WDNY) 1926, 15 F.(2d) 575;

The Heroe (D. Dela.) 1884, 21 Fed. 525;

The Wanderer (C.C., D. La., 1880) 20 Fed. 655.

In principle, appellees' case of *Gaynor v. The New Orleans* (N.D. Cal., 1944) 54 F.Supp. 25, 18 is the same. The libel was based on a written agreement between seamen and San Francisco Bay ferryboat owners that the opening of the new bridges would terminate ferry service and upon those events the seamen would receive dismissal benefits. Thus when the ferries stopped the benefits were earned and became payable.

Archawski v. Hanioti (SDNY, 1955) 129 F.Supp. 410, only holds that the owner may be held personally liable in admiralty for the enforcement of contracts of affreightment.

5. Fishermen who were wrongfully discharged or severed from the vessel through injuries, may lien the vessel for shares providing the vessel continues with the voyage, catches fish, and the shares have been, or may be, computed:

Mason v. Evanisevich (9th Cir., 1942) 131 F. (2d) 858;

The American Beauty (W.D. Wash., 1924) 295 Fed. 513;

The Montague (W.D. Wash., 1943) 53 F.Supp. 548.

CONCLUSION

As noted in our opening brief, appellants' authorities cannot be answered. In effect the District Court concluded that *Old Point Fish Co., Inc. v. Haywood* (4 Cir. 1940) 109 F.(2d) 703, governed the case. The entire field of admiralty law cannot be overcome by Judge Parker's dissenting opinion. But the appellees have nothing else to rely on. Actually the dissent is not applicable for Judge Parker was not confronted with the innocent holders of a valid first preferred marine mortgage. Rather, he was simply weighing the equities between the repairmen and the seamen as disclosed at the end of his opinion on page 708, where he says that the repairmen should be charged with direct knowledge of the seamen's plight.

The appellees find themselves in an unfortunate situation but they are not without their remedies: they may press Tobin for their investments, which obviously they thought they were doing when the respective libels were filed.

Respectfully submitted,

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